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RECENT SUPREME COURT CASES

United States v. Ruiz, 122 S.Ct. 2450 (2002).

After agents found 30 kilograms of marijuana in Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain asks a defendant to waive indictment, trial, and an appeal. In return, the government agrees to recommend to the sentencing judge a two-level downward departure from the otherwise applicable guideline range.

A "fast track" plea agreement specifies that "any known information establishing the factual innocence of the defendant has been turned over to the defendant." Moreover, the agreement acknowledges the government's "continuing duty to provide such information bearing on the defendant's innocence."

However, the agreement requires the defendant to waive the right to receive: (1) "impeachment information relating to any informants or other witnesses" and (2) "information supporting any affirmative defense the defendant would raise" if the case went to trial. Because Ruiz failed to waive her right to receive information supporting any

affirmative defense that she would raise if her case went to trial, the prosecutors indicted her for unlawful drug possession. Ruiz eventually pled guilty without the benefit of a plea agreement.

At sentencing, Ruiz moved the district court for the same two-level downward departure that the government would have recommended had she accepted the "fast track" agreement. The government opposed Ruiz's request and the district court denied it.

Ruiz appealed her sentence to the 9th Circuit which vacated the district court's guideline determination. According to the court, the Constitution requires prosecutors to make impeachment information available to a defendant before trial. Thus, in the 9th Circuit, a guilty plea was not "voluntary" unless the prosecutor first made the same disclosure of material impeachment information that he would have made had the defendant insisted upon a trial.

The court ruled that this Constitutional obligation entitled Ruiz to receive impeachment material before she entered into a plea agreement. Finally, the court held that the Constitution prohibited a defendant from waiving her right to the production of this impeachment information.

The government sought *certiorari* and the question presented was whether the 5th and 6th Amendments required federal prosecutors, before entering into a binding plea agreement with a defendant, to disclose "impeachment information relating to any

informants or other witnesses.”

The Court found that due process requires prosecutors to “avoid an unfair trial by making available, upon request, evidence favorable to an accused where the evidence was material either to guilt or punishment.” However, when a defendant pleads guilty, she foregoes not only a right to a fair trial but also other constitutional guarantees that are attendant to a trial.

The Supreme Court ruled that due process does not require the pre-guilty plea disclosure of impeachment information. Although impeachment material is essential to ensure the fairness of the trial, it is not to be taken into the calculus in determining whether a plea was voluntary. The Court found that if it imposed a constitutional obligation to provide impeachment material during the plea bargaining process, this obligation would seriously interfere with the government’s interest in securing guilty pleas that were factually justified and desired by the defendants. Moreover, the requirement invented by the 9th Circuit would require the government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea bargaining process of its main resource-saving advantage. As a result, the 9th Circuit was reversed.

Board of Education v. Earls, 122 S.Ct.2559 (2002).

A drug testing policy implemented by the Tecumseh, Oklahoma Board of Education required all middle and high school students who participated in athletic and non-athletic (e.g. band, choir, Academic Team) competitive extracurricular activities to submit to drug testing. Participants must consent to a drug test before they were permitted to participate in the activity. Moreover, participants must also submit to random drug testing while participating in that activity and must agree to be tested at any time upon reasonable suspicion.

After a first positive test, the school would contact the student’s parent or guardian for a meeting. A student with one positive test would be permitted to participate in the activity as long as he: (1) showed proof of his participation in drug counseling within five

days of the meeting; and (2) submitted to a second test within two weeks of the meeting.

A student with two positive tests would be permitted to participate in the activity after he: (1) was suspended from the activity for 14 days; (2) completed four hours of substance abuse counseling; and (3) submitted to monthly drug tests. A student with three positive tests would be suspended from the activity for the remainder of the school year or 88 days, whichever was long.

Lindsay Earls was a member of the choir, band, the Academic Team, and the National Honor Society. Daniel James sought to participate in the Academic Team. Earls and James filed suit against the Board of Education challenging the drug testing policy on its face, as well as its application to their participation in extracurricular activities. Earls and James alleged that the policy violated the 4th and 14th Amendments and they sought injunctive and declaratory relief.

The district court granted summary judgment to the Board of Education; however, the 10th Circuit reversed after holding that the policy violated the 4th and 14th Amendments. According to the court, before imposing a suspicionless drug testing program, the school must “demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students would actually redress its drug problem.” Because the Board of Education failed to demonstrate such a problem existed, the policy was declared unconstitutional.

The Board of Education appealed and the Supreme Court held that searches by public school officials, including the collection of urine samples, triggered 4th Amendment protections. Earls and James maintained that drug testing would be permissible only if there was individualized reasonable suspicion to justify the request for testing.

However, the Supreme Court found that the 4th Amendment did not impose a “irreducible requirement of individualized suspicion.” Instead, in certain limited circumstances, the government’s interest in discovering latent conditions, or to prevent their development, was sufficiently

compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.

While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, their 4th Amendment rights are different in public schools than elsewhere. A student's privacy interest is limited in a public school environment where the State was responsible for maintaining discipline, health, and safety. Moreover, the Court had previously held that "securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."

The Court found that it was irrelevant that the policy applied to children who were participating in both athletic and non-athletic endeavors as both groups of students had a limited expectation of privacy. Instead, the Court focused on the school's custodial responsibility and authority over children.

The Court next considered the character of the intrusion imposed by the policy. Contrary to popular opinion, the Court held that "urination was an excretory function traditionally shielded by great privacy." However, the "degree of intrusion on one's privacy caused by collecting a urine sample depends upon the manner in which production of the urine sample is monitored."

Because a faculty monitor would wait outside the closed restroom stall for the student to produce a sample, the Court held that the level of intrusion was "negligible." Moreover, the test results were confidential and were kept in a separate file from the student's educational records. Importantly, the test results were not turned over to law enforcement personnel. Instead, the only consequence was that a student with a positive test would be limited in his ability to participate in the student activity.

Finally, the Court held that the policy was tailored to the nature and the immediacy of the government's interest in preventing drug use by schoolchildren. Consequently, the Court concluded that the policy was a reasonable means of furthering the Board of Education's important interest in preventing and deterring drug use by schoolchildren. Accordingly, the 10th Circuit was reversed.

Carey v. Saffold, 122 S.Ct. 2134 (2002).

Under 28 U.S.C. § 2244(d)(1)(A), the AEDPA requires a state prisoner, seeking a federal habeas remedy, to file his habeas petition within one year after his state conviction has become final. However, § 2244(d)(2) provides that the one year period does not include the time during which an application for state collateral review is "pending" in the state courts.

In 1990, Saffold was sentenced by a California state court and his conviction became final in April 1992. Because Saffold's conviction became final before the AEDPA became effective, the federal limitations period began running on the date that the AEDPA was enacted (April 24, 1996). Under the acknowledged grace period, Saffold had one year from that date (in the absence of tolling) to file a federal habeas petition.

The week before the deadline, Saffold filed a state habeas petition before the California trial court. Five days after this petition was denied, Saffold filed a petition in a California appellate court. This petition was also denied and 4 ½ months later, Saffold filed another petition in the California Supreme Court.

The California Supreme Court denied Saffold's petition stating in a single sentence that it did so "on the merits and for lack of diligence." One week later, in early June 1998, Saffold filed a § 2254 petition.

The district court ruled that the AEDPA required Saffold to file his petition by April 24, 1997. The district court recognized that the statute also gave Saffold extra time, through the limitations period, while his application for state collateral review was pending.

However, the district court decided that Saffold's petition was "pending" only while the state courts were actively considering it and that period did not include the intervals between the time a lower state court had denied Saffold's petition and the time that he had filed another petition in a higher state court.

Thus, in Saffold's case, those intervals amounted to five days (between the trial court and intermediate court) plus 4 ½ months

(between the intermediate court and the California Supreme Court). These intervals made a critical difference. Without counting the intervals as part of the time that Saffold's application for state collateral review was "pending," Saffold's federal habeas petition was not timely filed.

Consequently, the district court dismissed Saffold's petition. However, the 9th Circuit reversed and included in the "pending" period, and hence in the tolling period, the intervals between what was consideration of a petition by a lower state court and further consideration by a higher state court. In arriving at this conclusion, the court ruled that Saffold's petition to the California Supreme Court was filed in a timely manner despite a delay of 4 ½ months.

The 9th Circuit arrived at this conclusion because the California Supreme Court denied Saffold's petition, not only because of "lack of diligence" but also "on the merits." Because of this language, the court held that the "on the merits" determination established that the California Supreme Court had "applied its untimeliness bar only after considering, to some degree, the underlying federal constitutional questions raised."

The Warden petitioned for a writ of *certiorari* and the following three questions were certified: (1) Does that word "pending" cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court? The Court answered affirmatively. (2) If so, does it apply similarly to California's unique state collateral review system - a system that does not involve a notice of appeal, but rather the filing (within a "reasonable" time) of a further original state habeas action in a higher court? The Court answered affirmatively. (3) If so, was the petition at issue in this case (filed in the California Supreme Court 4 ½ months after the lower state court reached its decision) "pending" during that period, or was it no longer "pending" because it failed to comply with California's timeliness rules? The Court remanded for a determination on this question.

The Supreme Court summarized the collateral review process that was applicable in most states ("appeal states") as follows: "(1) the prisoner filed a petition in the state

court of first instance, typically a trial court; (2) a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within the period of time after the entry of the trial court's judgment; and (3) a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time after the judgment of the court of appeals has been entered.

In this case, the Warden argued for a "uniform national rule" to the effect that an application for state collateral review was not "pending" in the state courts during the interval between a lower court's entry of judgment and the timely filing of the notice of appeal in the next court. The rationale for this argument was that during this period of time, the petition was not under court consideration.

However, the Supreme Court found that the Warden's argument was inconsistent with the ordinary meaning of "pending." The Court held that an application is "pending" as long as the ordinary state collateral review process is "in continuance—(*i.e.* until the completion of" that process). In other words, the application is pending until it has achieved final resolution through the post-conviction procedure.

After providing a definitional framework for "pending," the Court determined whether this rule applies in California. California's collateral review system differs from "appeal states" in that California does not require appellate review of a lower court's determination. Instead, it contemplates that a prisoner will file a new "original" habeas petition in the appellate court. Moreover, California's system determines the timeliness of each filing according to a "reasonableness" standard, whereas "appeal states require a notice of appeal to be filed within a specified time.

The Warden argued that these differences require treating California cases differently from "appeal states," in particular by not counting a petition as "pending" during the interval between a lower court's determination and the filing of another petition in a higher court.

However, the Supreme Court was not

overly impressed with the Warden's argument that California's system was unique from the system found in "appeal states." The Court found that California's collateral review process functions very much like that of other states but for the fact that its timeliness rule is based on a "reasonableness" standard.

However, the Court found that this was a distinction without a difference. The fact that California's timeliness requirement was general, rather than precise, may make it more difficult for federal courts to determine just when a review application (i.e. a filing in a higher court) is time barred. But it is the state's interest that the tolling provision seeks to protect, and the state, through its supreme court decisions or legislation, can explicate timing requirements more precisely should that prove necessary.

Finally, the Court addressed whether Saffold delayed "unreasonably" in seeking review in the California Supreme Court. If so, Saffold's application would no longer have been "pending" during this period and his § 2254 petition would be barred under the statute of limitations.

Saffold filed his petition for review in the California Supreme Court 4 ½ months after the appellate court issued its decision. The 9th Circuit ruled that this filing was timely because the California Supreme Court considered the petition both "on the merits and for lack of diligence."

However, the Supreme Court found that the California Supreme Court's utilization of the words "on the merits," could not alone be taken to indicate that the petition was timely filed under the amorphous "reasonableness" standard. Because the Court was unable to divine a precise meaning from the words contained in the California Supreme Court's order, the case was remanded to the 9th Circuit to evaluate and determine whether Saffold filed his petition within a "reasonable" period of time.

Harris v. United States, 122 S.Ct. 2406 (2002).

Harris sold illegal narcotics out of his pawn shop while he had a pistol visible at his side. As a result, Harris was charged with violating federal drug and firearms laws, including 18 U.S.C. § 924(c)(1)(A).

Section 924 (c)(1)(A)(i) is the default provision that provides a penalty of "not less than five years" for those convicted of using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime. However, subsection (ii) mandates a penalty of "not less than seven years" if a firearm was brandished while subsection (iii) provides a penalty of "not less than ten years" if a firearm was discharged.

The government operated under the assumption that § 924 (c)(1)(A) defined a single crime. For this reason, the indictment did not mention the term "brandishing" and made no reference to 18 U.S.C. § 924(c)(1)(A)(ii). Instead, the indictment simply alleged the elements from § 924 (c)(1)(A)'s principle paragraph that "during and in relation to a drug trafficking crime," Harris knowingly carried a firearm.

According to the government's theory, if a jury convicted Harris for violating § 924 (c)(1)(A), the district court would select the appropriate sentence after determining whether Harris: carried, brandished, or discharged a firearm. Under this theory, the government considered these three verbs as sentencing factors to be determined by a judge after Harris was convicted by a jury.

Harris was convicted of both the drug and firearm offenses. Following his conviction, Harris' presentence report recommended the imposition of a seven year sentence under § 924(c)(1)(A)(ii) because he brandished a firearm. However, Harris objected to this recommendation and argued that brandishing was an element of a separate offense for which he had neither been indicted nor tried.

The district court overruled Harris' argument and found, by a preponderance of the evidence, that he had brandished a firearm and sentenced him to serve seven years in prison on the § 924(c) conviction. On appeal, the 4th Circuit affirmed and ruled that § 924(c) made brandishing a sentencing factor and not an element of the offense. Consequently, the 4th Circuit held that the district court could make a determination on how the firearm was employed by a preponderance of the evidence standard.

Harris appealed to the Supreme Court

and the first issue considered by the Court was whether Congress made brandishing an element or a sentencing factor for defendants convicted of violating § 924(c)(1)(A). The government maintained that the body of § 924(c) sets forth a single crime while subsections (i),(ii), and (iii) set forth only factors for the sentencing judge to select in establishing an appropriate penalty. In contrast, Harris maintained that Congress constructed § 924(c)(1)(A) to define three separate crimes. According to Harris, § 924(c)(1)(A)(ii) created a separate offense of which brandishing was an essential element to be pled and proven to the jury.

The Supreme Court's precedent on similar questions obfuscated the resolution of the question presented in this case. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court sustained a statute that increased the mandatory minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by preponderance of the evidence, that the defendant possessed a firearm during the commission of a crime. Fourteen years later in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, whether the statute calls it an element or a sentencing factor, must be submitted to a jury, and proved beyond a reasonable doubt."

In solving the conundrum presented by the case *sub judice*, the Court acknowledged that the statute did not state whether brandishing was an element or a sentencing factor. However, the Court examined the structure of the statute and concluded, in a plurality decision, that § 924(c)(1)(A) sets forth one offense while subsections (i), (ii), and (iii) set forth sentencing factors that were to be found by the judge and not offense elements that were to be pled and proven to a jury. This conclusion was supported by the statutory construction maxim that "federal laws usually list all elements in a single sentence and separate the sentencing factors into subsections."

Harris next argued that *McMillan* was no longer sound authority in light of the

Court's decision in *Apprendi*. However, the Court ruled that the holdings in *McMillan* and *Apprendi* were consistent because there was a fundamental distinction between the factual findings that were at issue in those two cases.

The sentencing factor in *McMillan* did not increase the penalty for a crime beyond the prescribed statutory maximum. Moreover, the sentencing factor in *McMillan* did not alter the prescribed range of penalties to which a criminal defendant was exposed. Instead, *McMillan* merely required the sentencing judge to impose a specific sentence, within the range authorized by the statute, after the jury found the defendant guilty of an underlying crime. In comparison, *Apprendi* stands for the proposition that any fact extending a defendant's sentence beyond the maximum authorized by the jury's verdict was an element of the crime and thus within the domain of the jury.

The Court read *McMillan* and *Apprendi* in *pari materia* to mean that "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis. However, within the sentencing range authorized by the jury's verdict, the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings."

Thus, facts that would cause a mandatory minimum sentence to increase, but would not affect the statutory maximum, are sentencing factors that are reserved for the trial judge to find by a preponderance of the evidence. Moreover, judicial fact finding, in the course of selecting a sentence within the authorized sentencing range does not implicate the indictment, jury trial, and reasonable doubt components of the 5th and 6th Amendments.

Consequently, the Court held that § 924(c) was constitutional. Basing a two year increase in Harris' minimum sentence on the judge's finding that Harris brandished a weapon did not evade the requirements of either the 5th or 6th Amendments. Instead, "Congress simply took one factor that has always been considered by sentencing courts

to bear on punishment and dictated the precise weight to be given that factor.”

Ring v. Arizona, 122 S.Ct.2428 (2002).

In Arizona, following a jury verdict convicting a defendant of capital murder, a trial judge sitting alone, determines the presence or absence of the aggravating and mitigating factors enumerated under Arizona law. After this weighing process is completed, if the trial judge decides that the aggravating circumstances outweigh the mitigating circumstances, the defendant is sentenced to death. If the mitigating circumstances outweigh the aggravating circumstances, the defendant is sentenced to life imprisonment.

In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court held that Arizona’s sentencing scheme was compatible with the 6th Amendment because the additional facts found by judge qualified as sentencing factors and not as elements of the offense of capital murder. However, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that “the 6th Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” According to the *Apprendi* mandate, this proscription governs even if the state characterizes the additional findings made by the judge as “sentencing factors.”

Ring was convicted by a jury of felony murder in violation of Arizona law. The presiding judge then conducted a separate sentencing hearing to determine the presence or absence of the enumerated aggravating and mitigating circumstances. After this sentencing hearing, the trial judge entered a “special verdict” which sentenced Ring to death. The trial court based this decision on its finding that the aggravating factors outweighed the single mitigating factor that could be identified.

On appeal to the Arizona Supreme Court, Ring maintained that Arizona’s capital sentencing scheme violated the 6th and 14th Amendments because it entrusted to a judge the finding of a fact that would raise the maximum penalty from life imprisonment to death. In response, Arizona argued that the United States Supreme Court had previously upheld Arizona’s system in *Walton* and that

the doctrine of *stare decisis* mandated that the Arizona Supreme Court affirm Ring’s sentence. Predictably, the Arizona Supreme Court applied *Walton* and affirmed Ring’s death sentence.

Ring then appealed to the United States Supreme Court. The Court reviewed Arizona law and found that based solely on the jury’s verdict finding Ring guilty of felony murder, the maximum punishment he could have received was life imprisonment. This was the maximum punishment available because in Arizona, a death sentence cannot legally be imposed unless at least one aggravating factor was found to exist beyond reasonable doubt.

However, in this case, as in all Arizona death penalty cases, the jury did not make any findings on the existence of aggravating circumstances. Instead, the jury determined the issue of guilt and innocence and the trial judge, by statute, was then entrusted to find the existence or absence of aggravating and mitigating factors.

The question presented in the case *sub judice* was whether the aggravating factors may be found by the judge, as specified by Arizona law, or whether the 6th Amendment’s jury trial guarantee, made applicable to the states by the 14th Amendment, required the jury to determine the presence or absence of aggravating and mitigating factors?

The Supreme Court found that the holdings in *Walton* and *Apprendi* were irreconcilable. Consequently, the Court overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary to elevate the punishment from life imprisonment to the death penalty. Because Arizona’s enumerated aggravating factors operated as the equivalent of an element of a greater offense, the 6th Amendment required them to be found by a jury beyond a reasonable doubt.

Atkins v. Virginia, 122 S. Ct. 2242 (2002).

Atkins was convicted of capital murder under Virginia law. In the penalty phase of his case, Atkins elicited testimony from a forensic psychologist who concluded that Atkins was “mildly mentally retarded.”

This conclusion was based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had an IQ of 59. Nonetheless, the jury sentenced Atkins to death but the Virginia Supreme Court ordered a second sentencing hearing because the trial court used a misleading verdict form.

Upon re-sentencing, the same defense forensic psychologist testified but Virginia presented its own expert who opined that Atkins was not mentally retarded. Instead, Virginia's expert testified that Atkins had "average intelligence" as well as "anti-social personality disorder." Consequently, the jury again sentenced Atkins to death.

On appeal, Atkins maintained that "because he was mentally retarded, he could not be sentenced to death." The Virginia Supreme Court, relying on *Penry v. Lynaugh*, 492 U.S. 302 (1989), rejected Atkins' argument. However, two members of the Virginia Supreme Court dissented and characterized the Commonwealth's expert's opinion as "incredulous as a matter of law." Moreover, the dissenters concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 was excessive."

Because of the gravity of the concerns expressed by the dissenters and in light of the dramatic shift in the state legislative landscape that has occurred since *Penry* was decided in 1989, the Supreme Court granted *certiorari* to revisit the issue of whether the mentally retarded can be executed.

The basic concept underlying the Cruel and Unusual Punishment Clause of the 8th Amendment is that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Therefore, proportionality review under those evolving standards, should be informed by "objective factors to the maximum possible extent."

Since *Penry* was decided, state legislatures across the country, that have addressed this issue, have almost uniformly exempted the mentally retarded from execution. After evaluating the treatment that

most states have given to mentally retarded people convicted of capital crimes, the Court found that "it is fair to say that a national consensus has developed against it."

The Court concluded that this consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty.

Moreover, the Court held that the consensus also suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. However, because of their impairments, the mentally retarded have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the actions of others.

There is no evidence that the mentally retarded are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Although these deficiencies do not warrant an exemption from criminal sanction, they do diminish their personal culpability.

To legitimate the death penalty, the Court had previously identified "retribution and deterrence of capital crimes brought by prospective offenders as social purposes served by the death penalty." However, unless the imposition of the death penalty on mentally retarded persons measurably contributes to either of these goals, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment."

The Court reviewed the data and held that the execution of mentally retarded criminals will not measurably enhance the deterrent or retributive purpose of the death penalty. In sum, the Court ruled that "our independent evaluation of the issue reveals no

reason to disagree with the judgment of the legislatures that have recently addressed the matter and have concluded that death is not a suitable punishment for a mentally retarded criminal.”

Construing and applying the 8th Amendment in light of “our evolving standards of decency,” the Court concluded that punishment is excessive and that the Constitution places a substantive restriction on the state’s power to take the life of a mentally retarded offender. The judgment of the Virginia Supreme Court was reversed.

United States v. Drayton, 122 S. Ct. 2105 (2002).

In 1999, Christopher Drayton and Clifton Brown traveled on a Greyhound Bus en route from Ft. Lauderdale to Detroit. The bus made a scheduled stop in Tallahassee where the passengers were required to disembark so that the bus could be refuelled and cleaned. As the passengers reboarded, the driver checked their tickets and he also allowed three members of the Tallahassee Police Department to board the bus as part of a drug and weapons interdiction effort. The officers: were dressed in plain clothes; carried concealed weapons; and wore their badges visibly.

Once on board, Officer Hoover knelt on the driver’s seat and faced the rear of the bus. From this point, Officer Hoover could observe the passengers and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn proceeded to the rear of the bus. Officer Blackburn remained stationed at the rear of the bus and faced forward. However, Officer Lang worked his way toward the front of the bus after speaking with individual passengers as he went.

Officer Lang asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Officer Lang stood next to or just behind each passenger with whom he spoke. Passengers who declined to cooperate would have been allowed to do so without argument. However, Lang did not inform the passengers of their right to refuse to cooperate.

Brown and Drayton were seated next

to each other. Drayton was in the aisle seat while Brown was in the seat next to the window. Officer Lang approached Brown and Drayton from the rear and leaned over Drayton’s shoulder and identified himself as a police officer.

Officer Lang’s face was 12 to 18 inches away from Drayton’s at which time he asked if either of the men had bags on the bus. Both Brown and Drayton pointed to a green bag in the overhead luggage rack. Lang then asked “do you mind if I check it” and Brown responded “go ahead.” Lang then handed the bag to Officer Blackburn to check and no contraband was found.

However, Officer Lang noticed that both Brown and Drayton were wearing heavy jackets and baggy pants despite the warm weather. In Lang’s experience, drug traffickers often wear baggy clothing to conceal weapons or narcotics. Consequently, Office Lang asked Brown if he had any weapons or drugs in his possession. When Brown answered negatively, Officer Lang questioned “do you mind if I check your person?” Brown answered “sure” and cooperated by leaning up in his seat; pulling the cell phone out of his pocket; and opening his jacket.

Lang then reached across Drayton and patted down Brown’s jacket and pockets. In Brown’s thigh area, Lang detected hard objects similar to drug packages that he had detected on other occasions. Consequently, Lang handcuffed Brown and escorted him off of the bus.

Lang then asked Drayton “do you mind if I check you?” Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a pat down of Drayton’s thighs and detected hard objects similar to those found on Brown. Drayton was also arrested and escorted from the bus.

A subsequent search of both individuals revealed bundles of cocaine concealed between several pairs of their boxer shorts. Consequently, both Drayton and Brown were charged with conspiracy to distribute cocaine and possession with intent to distribute cocaine.

Both Brown and Drayton moved to suppress the cocaine after arguing that their

consent to the pat down search was invalid. However, the district court denied both motions to suppress after concluding that the police conduct was not coercive and that Brown and Drayton's consent was voluntary given. Drayton and Brown entered conditional pleas and appealed the search and seizure issue to the 11th Circuit.

The 11th Circuit reversed after adopting a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers advised passengers of their right not to cooperate and to refuse their consent to search. The government appealed to the Supreme Court.

The Court stated that the 4th Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to search provided a reasonable person would understand that he could refuse. The Court narrowed the issue in this case to be whether officers must advise bus passengers during these encounters of their right not to cooperate.

The Supreme Court found that even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage provided that they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he has not been seized.

In previous bus interdiction cases, the Supreme Court made it clear that for the most part, *per se* rules were not favored in the 4th Amendment context. As a result, the Court held that the 11th Circuit erred by erecting a *per se* rule. Instead, the Court concluded that the police did not seize either Drayton or Brown when they boarded the bus and began questioning the passengers. Instead, the officers gave the passengers no reason to believe that they were required to answer the officers' questions.

To support this conclusion the Court pointed to the following facts: when Officer Lang approached Brown and Drayton, he did not brandish a weapon or make any intimidating movements. Moreover, nothing

Office Lang said would suggest to a reasonable person that he was barred from leaving the bus or otherwise terminating the encounter.

The Court then considered whether Drayton or Brown were subjected to an unreasonable search, *i.e.*, whether their consent to the suspicionless search was involuntary. The Court ruled that Drayton and Brown's consent to search their luggage and their persons was voluntarily given. Nothing Officer Lang said indicated a command to consent to the search. Instead, when Drayton and Brown informed Lang that they had a bag on the bus, he asked for their permission to check it. Moreover, when Lang requested permission to search Brown and Drayton's persons, he first asked if they objected, thus indicating to a reasonable person that he was free to refuse.

Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search his person. In the final analysis, the Court found that "while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish knowledge as the *sine qua non* of an effective consent."

Instead, the totality of circumstances must control, without giving extra weight to the absence of this type of warning. Although Office Lang informed neither Drayton nor Brown of their right to refuse the search, he did request permission to search and the totality of the circumstances indicated that their consent was voluntarily given. Consequently, the searches were reasonable and the 11th Circuit was reversed.

McKune v. Lile, 122 S. Ct. 2017 (2002).

Lile was convicted of rape and other sex crimes in 1982. A few years prior to his release, prison officials ordered Lile to participate in a sexual abuse treatment program (SATP). As part of the SATP, inmates are required to complete an "admission of responsibility" form in which they accept responsibility for the crimes for which they have been sentenced. Moreover, inmates must also complete a sexual history

form detailing all prior sexual activities, regardless of whether the activities constituted uncharged criminal offenses.

The information obtained from SATP participants is not privileged and could be used against them in future criminal proceedings. Prison officials informed Lile that if he refused to participate in the SATP, his prison privileges would be reduced resulting in the curtailment of his: visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, and access to a personal television. Moreover, if he failed to participate in the SATP, Lile would also be transferred to a prison with a higher security designation.

Lile refused to participate in the SATP on the ground that the required disclosures of sex crimes for which he had not been convicted would violate his 5th Amendment privilege against compulsory self-incrimination. Consequently, Lile filed a § 1983 action seeking injunctive relief.

The district court granted Lile summary judgment and the 10th Circuit affirmed after holding that compelled self-incrimination can be established by the infliction of penalties that do not constitute deprivations of protected liberty interests under the Due Process Clause. Moreover, the 10th Circuit ruled that the reduction of Lile's prison privileges and the increase of his security designation were these types of penalties.

The 10th Circuit also found that Lile's disclosure of his history of sex crimes would be incriminating. Finally, the Tenth Circuit held that although the SATP served Kansas's interests in rehabilitating sex offenders and promoting public safety, those interests could be served without violating the Constitution by either treating the admissions by the inmates as privileged or by granting inmates use immunity.

The Warden appealed to the Supreme Court which framed the central question of this case as whether the Kansas's SATP, and the consequences for non-participation in it, combined to create a "compulsion" that encumbered the constitutional right against compelled self-incrimination? If there was

compulsion, the state could not continue the program in its present form.

The Court concluded that the SATP did not compel prisoners to incriminate themselves in violation of the Constitution. Instead, the Court found that the consequences in question here – the transfer to another prison where television sets are not placed in each inmate's cell, where exercise facilities are not readily available, and where work and wage opportunities are more limited – are not ones that "compel" a prisoner to speak about his past crimes despite a desire to remain silent.

The Supreme Court held that the fact that these consequences are imposed on prisoners, rather than ordinary citizens, was important in weighing Lile's constitutional claim. Even though the privilege against self-incrimination does not terminate at the jail house door, a valid conviction and the attendant restrictions on liberty are essential to the 5th Amendment analysis.

A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction. The Court ruled that prison conditions cannot give rise to due process violations unless those conditions constitute "a typical and significant hardship on inmates in relation to the ordinary incidents of prison life."

Thus, the compulsion inquiry must consider the significant restraints already inherent in prison life and the state's vital interest in rehabilitation goals and procedures within the prison system. Consequently, a prison clinical rehabilitation program "which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute a typical significant hardship in relation to the ordinary incidents of prison life."

Lile also claimed that if he remained silent about his past crimes, he would be punished by being transferred from a facility where SATP occurs to a facility with a higher

security designation. The Court found that this transfer was not intended to punish prisoners for exercising their 5th Amendment rights. Instead, the limitation on these rights was incidental to Kansas' legitimate penological reason for the transfer: "due to limited space, inmates who do not participate in their respective programs will be moved out of the facility where the programs are held to make room for other inmates."

The Supreme Court also ruled that if the state had to offer immunity to each sex offender, "the practical effect would be that sex offenders who were incarcerated for but one violation would be given a windfall for past bad conduct, a result potentially destructive to any public support for the program and quite at odds with the dominant goal of acceptance of responsibility."

Accordingly, the judgment of the 10th Circuit was reversed. It should be noted that the Court's opinion was a plurality opinion. Justice O'Connor concurred in the plurality but differed from the opinion's rationale in one material respect. Justice O'Connor agreed with the dissent that the 5th Amendment compulsion standard was broader than the "atypical and significant hardship" standard that was applied by the plurality.

However, Justice O'Connor did not believe that the alterations in Lile's prison conditions as a result of his failure to participate in the SATP program were so great to constitute compulsion for the purposes of the 5th Amendment privilege against self-incrimination analysis.

United States v. Cotton, 122 S. Ct. 1781 (2002).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In federal prosecutions, these facts must also be charged in the indictment. In this case, the Court addressed whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies the decision of a court of appeals that vacates the enhanced

sentence, even though the defendants did not object in the trial court?

The six defendants in this case helped run Stanley Hall Jr.'s vast crack organization in Baltimore. A federal grand jury returned a superseding indictment which charged the Defendants with engaging in a conspiracy to distribute a "detectable amount" of cocaine and crack. Thus, the superseding indictment did not allege any of the threshold levels of drug quantity that would lead to an enhanced penalty under 21 U.S.C. § 841(b).

At the trial of this case, the district court instructed the jury that "as long as you find that a defendant conspired to distribute or possessed with intent to distribute these controlled substances, the amounts are not important." The jury found all Defendants guilty of the conspiracy offense.

Moreover, even though Congress established a term of imprisonment of not more than 20 years for drug offenses involving a "detectable quantity" of cocaine and/or crack, the district court did not sentence the Defendants under this provision. Instead, consistent with the practice in federal courts at that time, the district court attributed to all Defendants a drug quantity that implicated the enhanced penalties of § 841(b)(1)(A) which prescribes a maximum term of imprisonment of life.

Consequently, two of the Defendants were sentenced to 30 years imprisonment while the other four Defendants received life terms imprisonment. Significantly, none of the Defendants objected to the fact that their sentences were based on a drug quantity that was not alleged in the indictment.

While the Defendants' appeals were pending, *Apprendi* was decided. Consequently, the Defendants argued in the 4th Circuit that their sentences were invalid under *Apprendi* because the drug quantity issue was neither alleged in the indictment nor submitted to the jury. Because the issue was not raised in the district court, the 4th Circuit reviewed the argument for plain error.

The court decided that the Defendants' sentences should be vacated because an indictment setting forth all of the essential elements of an offense is both mandatory and

jurisdictional. Moreover, the court concluded that the error seriously affected the fairness, integrity, and public reputation of judicial proceedings. Consequently, the government appealed to the Supreme Court.

First, the Supreme Court ruled that defects in an indictment do not deprive a court of its power to adjudicate a case. Thus, the Court rejected the notion that indictment defects are “jurisdictional.” Consequently, the Court proceeded to apply the plain error standard to the Defendants’ forfeited claim.

Before an appellate court can correct an error not raised at trial, there must be (1) error; (2) that is plain; and (3) that affects substantial rights. If all three of these conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The parties did not dispute that after *Apprendi*, the sentences imposed in this case were both error and that the error was plain. Moreover, the Court proceeded to assume, but did not decide, that the error affected the Defendants’ substantial rights. However, the Court concluded that the error did not “seriously affect the fairness, integrity, or public reputation of judicial proceedings.”

The Court came to this conclusion because the evidence that the conspiracy involved at least 50 grams of crack was “overwhelming” and “uncontroverted.” By providing for graduated penalties in § 841(b), Congress intended that defendants who become involved in large scale drug operations receive more severe punishment than those committing drug offenses involving lesser quantities.

Based on this rationale, the Court ruled that the “fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society, the most severe punishments. The real threat then to the fairness, integrity, and public reputation of judicial proceedings would be if the Defendants, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those

committing less substantial drug offenses because of an error that was never objected to a trial.” Accordingly, the 4th Circuit was reversed and the case was remanded.

Alabama v. Shelton, 122 S. Ct. 1764 (2002).

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court held that defense counsel must be appointed in any criminal prosecution, “whether classified as a petty, misdemeanor, or felony,” that “actually leads to imprisonment even for a brief period.” Moreover, in *Scott v. Illinois*, 440 U.S. 367 (1979), the Court drew the line at “actual imprisonment,” holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.

Shelton was charged with third degree assault in Alabama which carries a maximum punishment of one year imprisonment and a \$2,000 fine. Shelton invoked his right to a trial where he appeared without a lawyer and was convicted. The trial court repeatedly warned Shelton about the problems of self-representation but at no time offered him the assistance of counsel at state expense. Shelton was sentenced to serve 30 days in jail but the sentence was suspended and he was placed on probation for two years.

Shelton appealed his conviction and sentence on 6th Amendment grounds and the Alabama Court of Criminal Appeals affirmed. The court held that an indigent defendant who received a suspended prison sentence had no constitutional right to state appointed counsel. However the court remanded the case for a determination as to whether Shelton made a knowing, intelligent, and voluntary waiver of this right.

After the case returned from remand, the court of appeals reversed course and concluded that a suspended sentence does not trigger the 6th Amendment right to appointed counsel unless there is evidence that the defendant has actually been deprived of his liberty. Because Shelton remained on probation, the Court ruled that he had not been denied his right to counsel.

The Alabama Supreme Court reversed after reasoning that a defendant may not be

sentenced to a term of imprisonment absent appointment of counsel. In the view of the Alabama Supreme Court, a suspended sentence constitutes a “term of imprisonment” within the meaning of *Argersinger* and *Scott* even though incarceration was neither immediate nor inevitable. Thus, the Alabama Supreme Court affirmed Shelton’s conviction but invalidated “that aspect of his sentence imposing 30 days of suspended jail time.”

The question presented to the United States Supreme Court was whether the 6th Amendment right to appointed counsel, as delineated in *Argersinger* and *Scott*, applies to a defendant in Shelton’s situation?

The Court ruled that a suspended sentence that may “end up in the actual deprivation of a person’s liberty” may not be imposed unless a defendant was afforded the “guiding hand of counsel” in the prosecution for the crime charged. Therefore, the Court affirmed the Alabama Supreme Court’s finding that a defendant who receives a suspended or probated sentence of imprisonment has a constitutional right to counsel.

Ashcroft v. ACLU, 122 S. Ct.1700 (2002).

In 1994, Congress enacted the Child Online Protection Act (COPA) as a means to restrict a minor’s access to pornographic material on the internet. The COPA, which is codified at 47 U.S.C. § 231(a)(1), prohibits any person from “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the worldwide web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”

Congress limited the scope of the COPA’s coverage in at least three ways. First, the COPA applies only to material displayed on the worldwide web. Second, the COPA covers only communications made “for commercial purposes.” Third, the COPA restricts only the narrow category of “material that is harmful to minors.”

The COPA provides affirmative defenses to those subject to prosecution. An individual may qualify for a defense if he “in

good faith, has restricted access by minors to material that is harmful to minors – (a) by requiring the use of a credit card, debit account, adult access code, or adult personal identification numbers; (b) accepting a digital certificate that verifies age; or (c) by any other reasonable measures that are feasible under available technology.” Persons violating the COPA are subject to both civil and criminal sanctions.

One month before the COPA was scheduled to go into effect, the ACLU filed suit on behalf of a group of plaintiffs that maintain their own websites. While the vast majority of the content on the sites is available for free, the plaintiffs derived all of their income from these sites. The plaintiffs alleged that although they believed that the material on their sites was lawful for adults to view, they feared that they would be prosecuted under the COPA because some of their material could be construed as “harmful to minors” in some communities.

The plaintiffs’ facial challenge claimed that the COPA violated adults’ rights under the 1st and 5th Amendments because (1) it created an effective ban on constitutionally protected speech by and to adults; (2) was not the least restrictive means of accomplishing any compelling governmental purpose; and (3) was substantially overbroad.

The district court in the Eastern District of Pennsylvania granted plaintiffs’ motion for a preliminary injunction and barred the government from enforcing the COPA until the merits of the plaintiffs’ claims could be adjudicated. The district court focused on the claim that the COPA abridged the free speech rights of adults and it ruled that plaintiffs had established a likelihood of success on the merits.

The district court ruled that the COPA instituted content based regulation of sexual expression that was protected by the 1st Amendment. Therefore, the statute was presumptively invalid under Supreme Court precedent and subject to strict scrutiny. The district court proceeded to hold that the plaintiffs were likely to establish that the COPA could not withstand “strict scrutiny” because it was not apparent that the COPA

was the least restrictive means of preventing minors from accessing “harmful to minors material.”

The Attorney General appealed and the 3rd Circuit affirmed. The 3rd Circuit concluded that the COPA’s use of contemporary community standards to identify material that was harmful to minors rendered the statute substantially overbroad. Because web publishers were without any means to limit access to their sites based on the geographic location of particular internet users, the 3rd Circuit reasoned that the COPA would require any material that might be deemed harmful “by the most puritan of communities in any state to be placed behind an age or credit card verification system.”

The Attorney General then petitioned for *certiorari* and the issue presented to the Court was whether the COPA’s use of community standards to identify material that was harmful to minors violated the 1st Amendment.

In *Miller v. California*, 413 U.S. 15 (1973), the Court set forth a three-part test to determine whether material was obscene and therefore not protected by the 1st Amendment: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Thus, in adopting the contemporary community standards approach, the primary concern of the Court in *Miller* was to be certain that the material was judged by its impact on an average person, rather than a particularly susceptible or sensitive person or indeed a totally insensitive one.

However, the 3rd Circuit concluded that prior Supreme Court precedent construing community standards had no applicability to the internet and the worldwide web because web publishers were without the ability to control the geographic scope of the recipients of their communications.

The Supreme Court found that the 3rd

Circuit’s methodology was inherently flawed because community standards need not be defined by reference to a precise geographic area. To fall within the scope of the COPA, works must not only depict, describe, or represent any matters that were patently offensive with respect to minors, particular sexual acts or particular parts of the anatomy, it must also be designed to appeal to the prurient interests of minors and taken as a whole, lack serious literary, artistic, political, or scientific value for minors.

In the end, the Court ruled that these preconditions substantially limited the amount of material covered by the statute. Consequently, the Court found that the COPA’s reliance on community standards to identify material that was harmful to minors did not, by itself, render the statute substantially over-broad for purposes of the 1st Amendment. However, the Court was careful to express no view as to whether the COPA: suffered from substantial overbreadth for reasons other than its use of community standards, was unconstitutionally vague, or survived strict scrutiny. Instead, the Court bestowed this honor on the 3rd Circuit.

Ashcroft v. The Free Speech Coalition, 122 S. Ct. 1389 (2002).

The Child Pornography Prevention Act of 1996 (CPPA) found at 18 U.S.C. § 2251 *et seq.*, extends the federal prohibition against child pornography to include not only sexually explicit images that appear to depict minors but also those images that were produced without using real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors, or by using computer imaging.

As a general rule, pornography can be banned only if obscene, but under *New York v. Ferber*, 458 U.S. 747 (1982), pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). *Ferber* recognized that “the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the state’s particular and more compelling interest in prosecuting those who

promote the sexual exploitation of children.”

The Supreme Court assumed that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. However, the CPPA was not directed at speech that was obscene. Instead, the CPPA sought to reach beyond obscenity and it made no attempt to conform to the *Miller* standard. For instance, the statute would reach individual depictions, such as movies, even if they had redeeming social value.

Consequently, the principle question to be resolved by the Supreme Court was whether the CPPA was constitutional where it proscribed a significant universe of speech that was neither obscene under *Miller* nor child pornography under *Ferber*?

18 U.S.C. § 2256(a)(B) prohibits any “**visual depiction**, including any photograph, film, video, picture, or computer or computer generated image or picture that is or **appears to be**, of a minor engaging in sexually explicit conduct.” Therefore, under this definition, the prohibition on “any visual depiction” is not dependent on how the images are produced.

The Supreme Court found that these images do not involve, let alone harm, any children in the production process. Nonetheless, Congress decided that the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. Under the congressional rationale, the harm flows from the content of the images, not from the means of their production.

Fearing that the CPPA threatened the activities of its members, the Free Speech Coalition challenged the statute in the United States District Court for the Northern District of California. The Coalition is a California trade association for the adult entertainment industry. The Coalition alleged that its members do not use minors in their sexually explicit works, but believed that some of the materials that its members produced might fall within the CPPA’s standard definition of child

pornography. The Coalition alleged that the “appears to be” and “conveys the impression” provisions of the CPPA were overbroad and vague and chilled them from producing works that were protected by the 1st Amendment.

The district court rejected the Coalition’s arguments and granted summary judgment in favor of the government. However, the 9th Circuit reversed the district court and reasoned that the government cannot prohibit speech because of its tendency to persuade viewers to commit illegal acts. Instead, the court held that the CPPA was substantially overbroad because it banned materials that were neither obscene nor produced by the exploitation of real children.

The government appealed to the Supreme Court which found that the Constitution gives significant protection from overbroad laws that chill speech within the 1st Amendment’s vast and privileged sphere. Under this principle, the CPPA was unconstitutional on its face if it prohibited a substantial amount of protected expression.

The sexual abuse of a child is a serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are some cultures of persons who harbor illicit desires for children and commit criminal acts to gratify those impulses. Moreover, Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and write of accounts of sexual activity with young children.

Congress may certainly pass laws to protect children from abuse; however, the prospect of crime by itself, does not justify laws suppressing protected speech. As a general principle, the 1st Amendment bars the government from dictating what we see, read, speak, or hear. However, the freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. All of these categories may be prohibited without violating the 1st Amendment but none of these categories includes the speech prohibited by the CPPA.

The CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller*, the government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.

In contrast, the CPPA applies to images that appear to depict the minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Instead, any depiction of sexually explicit activity, no matter how it is presented is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. Finally, it is not necessary that the image be patently offensive. Pictures of what appear to be 17 year olds engaging in sexually explicit activity do not in every case contravene community standards.

In sum, the CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea -- that of teenagers engaging in sexual activity -- that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age.

The government's argument to sustain the constitutionality of the statute was that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. However, the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The Court ruled that the government could not constitutionally premise legislation on the desirability of controlling a person's private thoughts.

The government may suppress speech that advocates the use of force or violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action. However, in this case, there was no attempt, incitement, solicitation, or conspiracy. Instead, the government showed no more than

a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.

Without a significantly stronger, more direct connection, the government may not prohibit speech based on the rationale that it may encourage pedophiles to engage in illegal conduct. The court concluded that § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons that the government offered in support of limiting the freedom of speech had no justification in precedent or in the law of the 1st Amendment. The Court ruled that § 2256(8)(B) was overbroad and unconstitutional.

The Coalition also challenged § 2256(8)(D). This provision bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that **conveys the impression** that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."

The Court ruled that the CPPA prohibits sexually explicit materials that "convey the impression" they depict minors. While that phrase may sound like the "appears to be" prohibition in § 2256(8)(B), it requires little judgment about the content of the image. Under § 2256(8)(D), the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography under § 2256(8)(D) if the title and trailers convey the impression that such scenes would be found in the movie.

Under § 2256(8)(D), the determination of whether the speech violates the statute turns on how the speech is presented, not on what is depicted. "While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way."

The Court concluded that § 2256(8)(D) prohibits a substantial amount of speech that falls outside of its precedent. Materials falling within the proscription are tainted and unlawful in the hands of all who

receive it, though they bear no responsibility for how it was marketed, sold, or described. Moreover, the statute does not require that the context be part of an effort at “commercial exploitation.”

As a consequence, the CPPA does more than prohibit pandering. Instead, the CPPA prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Under § 2256(8)(D), possession is a crime even when the possessor knows the movie was mislabeled.

The Court ruled that the 1st Amendment requires a more precise restriction. For this reason, the Court also held that § 2256(8)(D) was substantially overbroad and violated the 1st Amendment. Accordingly, in a rare move, the Court affirmed the 9th Circuit.

Department of Housing & Urban Development v. Rucker, et al., 122 S. Ct. 1230 (2002).

Because drug dealers “increasingly impose a rein of terror on public and other federally assisted low-income housing tenants,” Congress enacted legislation permitting the eviction of tenants and their guests who are involved in drug activity. The legislation provides that each “public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or **any drug related criminal activity** on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guests or other person under the tenant’s control, shall be cause for the termination of the tenancy.” 42 U.S.C. § 1437d(l)(6).

The Department of Housing & Urban Development (HUD) developed regulations closely tracking this statutory language that provided that when deciding to evict for a criminal activity, “the public housing authority shall have discretion to consider all of the circumstances of the case.” Thus, HUD made

it clear that it was the public housing authority’s discretion to evict for drug related activity including situations in which the tenant did not know, could not foresee, or did not control the behavior of the occupants of the unit.

In 1997, the Oakland Housing Authority (OHA) instituted eviction proceedings in state court against three tenants alleging violations of a lease provision that obligates tenants to “assure that a tenant, any member of the household, a guest, or another person under the tenant’s control, shall not engage in . . . any drug related criminal activity on or near the premises.” The complaint alleged that (1) the grandsons of William Lee and Barbara Hill, both of whom were listed as residents on the lease, were caught in the apartment complex parking lot smoking marijuana; (2) the daughter of Pearl Rucker, who resided with her and who was listed on the lease as a resident, was found with cocaine and a crack pipe three blocks from Rucker’s apartment; and (3) on three occasions within a two month period, Herman Walker’s caregiver and two others were found with cocaine in Walker’s apartment.

HUD interpreted § 1437d(l)(6) to allow the local public housing authority to evict a tenant when a member of the tenant’s household or a guest engaged in drug related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity. In contrast, Rucker, et. al, maintained that “innocent” tenants could not be evicted because of the criminal activity engaged in by either family members or a guest.

After OHA initiated the eviction proceedings in state court, the tenants commenced an action against HUD and OHA in federal court. The district court issued a preliminary injunction enjoining OHA from “terminating the leases of tenants for drug related criminal activity that does not occur within the tenant’s apartment unit when the tenant did not know of and had no reason to know of the drug related criminal activity.”

An *en banc* panel of the 9th Circuit affirmed the district court’s grant of the preliminary injunction. The court held that HUD’s interpretation permitting the eviction

of “innocent” tenants was “inconsistent with congressional intent and must be rejected.”

The Supreme Court reversed, holding that § 1437d(l)(6) unambiguously required lease terms that vested local public housing authorities with the discretion to evict tenants for the drug related activity of household members and guests whether or not the tenant knew, or should have known, about the activity. The Court found that Congress’s decision not to impose any qualification in the statute combined with its use of the term “any” to modify “drug related criminal activity” precluded any knowledge requirement.

Consequently, any drug related activity engaged in by a specified person is grounds for termination, not just drug related activity that the tenant knew, or should have known about. It was important to the Court that the statute did not require the eviction of any tenant who violated the lease provision. Instead, the statute entrusted the decision to evict to the local public housing authority after considering all of the factors of the case.

Mickens v. Taylor, 122 S. Ct. 1237 (2002).

In 1993, a Virginia jury convicted Mickens of premeditated murder of Timothy Hall and sentenced him to death. Mickens was unsuccessful on direct appeal and in June 1998, he filed a § 2254 petition alleging that he was denied the effective assistance of counsel because one of his court appointed attorneys had a conflict of interest.

Saunders had been appointed to represent Hall, a juvenile, on March 20, 1992 and talked to him once for 15 to 30 minutes the following week. Hall’s body was discovered on March 30, 1992. Four days later, a juvenile court judge dismissed the charges against Hall noting on the docket sheet that Hall was deceased. The docket sheet also listed Saunders as Hall’s counsel.

On April 6, 1992, the same judge appointed Saunders to represent Mickens. Saunders did not disclose to the court, his co-counsel, or Mickens that he had previously represented Hall. Mickens learned about Saunders’ prior representation of Hall when the juvenile court clerk mistakenly produced Hall’s file during the course of the discovery

process that was being conducted in the federal habeas case.

The district court conducted an evidentiary hearing and denied Mickens’ habeas petition. The 4th Circuit, *en banc*, assumed that the juvenile court judge had neglected a duty to inquire into a potential conflict of interest, but rejected Mickens’ argument that this failure either mandated an automatic reversal of his conviction or relieved him of the burden of showing that the conflict adversely affected his representation.

Instead, the 4th Circuit held that a defendant must show “an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known.” Concluding that Mickens had not demonstrated adverse effect, the 4th Circuit affirmed the district court’s denial of habeas relief.

Mickens then sought review by the Supreme Court which certified the following question to be presented: “what a defendant must show in order to demonstrate a 6th Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it may or reasonably should have known.”

As a general matter, a defendant alleging a 6th Amendment violation must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” However, there is an exception to this general rule. The Supreme Court has previously spared the defendant the need of showing probable effect upon the outcome, and has simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high, that a case by case inquiry is unnecessary.

However, only in circumstances of that magnitude does a court forego individual inquiry into whether counsel’s inadequate performance undermines the reliability of the verdict. Errors of that constitutional magnitude also occur when the defendant’s attorney actively represents conflicting interests.

Mickens argued that where a trial judge neglects a duty to inquire into potential conflict of interests, the defendant, to obtain reversal or the judgment, need only show that his lawyer was subject to a conflict of interest, and need not show that the conflict adversely affected counsel's performance. However, the Supreme Court rejected that interpretation.

Instead, the Court ruled that in order to demonstrate a 6th Amendment violation where the trial court failed to inquire into the potential conflict of interests about which it knew or reasonably should have known, a defendant must establish that the conflict of interest adversely affected his counsel's performance. Accordingly, the 4th Circuit was affirmed.

RECENT SIXTH CIRCUIT CASES

United States v. Sandlin, 291 F.3d 875 (6th Cir. 2002).

This opinion was filed to amend the court's original opinion found at 285 F.3d 407 (6th Cir. 2002). Sandlin confessed to officers that he had manufactured more than 50 grams of methamphetamine in three batches during a three month period during 1999. Sandlin was rewarded for his honesty by being indicted. He then entered a guilty plea to manufacturing and attempting to manufacture in excess of 50 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1).

Based on Sandlin's admission, the probation officer determined that his base offense level was 26 but this was reduced three levels for acceptance of responsibility. Based on Sandlin's criminal history category, his guideline sentencing range was 51-63 months; however, the mandatory minimum sentence found in 21 U.S.C. § 841(b)(1)(A)(viii) was ten years.

Sandlin maintained that the ten year sentence was only triggered if the offense involved the manufacturing of 50 grams or more of "pure" methamphetamine or more than 500 grams of a substance containing methamphetamine. Because Sandlin claimed that he did not produce pure methamphetamine, the mandatory minimum did not apply.

At Sandlin's sentencing hearing, the government presented the testimony of the

drug task force agent to whom Sandlin confessed. The agent informed the court of the recipe that Sandlin used to manufacture methamphetamine.

The government also presented the testimony of a forensic chemist who examined Sandlin's statement to the agent and the video tape of Sandlin's methamphetamine recipe. Based upon the testimony of the chemist, the district court found that the amount of methamphetamine easily reached the amount that would trigger the ten year statutory minimum and this was the sentence imposed.

On appeal, Sandlin argued that the district court erred by aggregating his three acts of manufacturing into one violation of § 841(a) to calculate the amount of drugs produced. In resolving the issue of whether the drugs could be aggregated, the 6th Circuit sought to give meaning to the phrase "a violation" found in 21 U.S.C. § 841(b)(1)(A).

In giving this phrase meaning, the court found that possession offenses should be treated differently than manufacturing offenses. Possession of a drug is a discrete act; one possesses drugs, in a specific quantity, at a particular point in time. Thus, the discrete acts must be treated as separate violations.

In contrast, manufacturing can involve either discrete acts or it can be an ongoing process. Someone knowledgeable about the drug manufacturing process can produce a relatively large quantity of methamphetamine over time, even though the batches of the drugs produced may be quite small when considered individually. If the quantities produced in a more or less continuous cycle of manufacturing reached the level specified in the statute, it would not be contrary to congressional intent to subject the manufacturer to the mandatory minimum.

However, with all of this said, the 6th Circuit ruled that the record did not indicate that "Sandlin manufactured these three batches on a continuing basis." "Without a specific finding with respect to this issue, the district court erred in aggregating the quantities of methamphetamine that Sandlin manufactured for sentencing purposes."

Based on prior 6th Circuit precedent, the district court should have treated each

batch of methamphetamine as a separate “violation of § 841(a)(1)” in considering whether Sandlin had produced sufficient quantities of methamphetamine to trigger the mandatory-minimum provision. When the amounts were considered individually, there was no indication that Sandlin ever manufactured, in a single batch, in excess of 50 grams of methamphetamine.

Because the court concluded that the district court erred in aggregating the quantities, the court remanded the case for resentencing and did not reach Sandlin’s argument that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Nichols v. United States, 285 F.3d 445 (6th Cir. 2002).

In 1992, Nichols pled guilty to being an armed career criminal and on April 10, 1992, the district court sentenced Nichols to serve 15 years imprisonment. Nichols did not file a direct appeal of either his conviction or sentence.

More than eight years later, Nichols filed a § 2255 motion to correct his sentence. In his motion, Nichols argued that his sentence was improper because he did not have three prior violent felony convictions to justify an enhancement under § 924(e). Moreover, Nichols maintained that under Michigan law, his civil rights were restored and therefore he was permitted to possess a firearm.

The district court denied Nichols’ motion after finding that it was both time-barred and procedurally defaulted. Nichols appealed this determination to the 6th Circuit. The court found that after the enactment of the AEDPA, § 2255 was amended by adding a one year statute of limitation to motions filed by federal prisoners. The AEDPA became effective April 24, 1996 and federal prisoners whose convictions became final prior to the effective date of the Act were entitled to a one year grace period, or until April 24, 1997, to file any motions for relief under § 2255. Because Nichols’ conviction became final in 1992 and he did not file his § 2255 motion until July 2000, he was well beyond the one year grace period.

The court next analyzed whether the running of the statute of limitations was

tolled. Section 2255 limits the running of this statute of limitations from the latest of the date on which the: (1) judgment of conviction became final; (2) impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by governmental action; (3) right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) facts supporting the claim presented could have been discovered through the exercise of due diligence.

The court found that because Nichols’ § 2255 motion failed to meet any of the requisite statutory criteria that might have allowed him to file this motion more than eight years after the final judgment in his case, his motion was time-barred and the opinion of the district court was affirmed.

United States v. Pelayo-Landero, 285 F.3d 491 (6th Cir. 2002).

In 1998, Tennessee law enforcement received information that a Hispanic male named “Jessie” was dealing cocaine in east Tennessee. An undercover agent made three purchases of several ounces of cocaine from Jessie during the course of the investigation. All of the transactions were conducted in English and Jessie offered the agent a kilogram of cocaine but disappeared before the deal could be completed.

In December 1999, an informant reported that Jessie was living with others in a trailer in Hamblen County, Tennessee and he was selling cocaine and marijuana. Subsequently, an informant went to the trailer and purchased a quantity of marijuana from Jessie who also offered to sell the informant cocaine in the future.

The informant was monitored by law enforcement officers and the agent who had previously made undercover purchases from Jessie. After purchasing the marijuana, the informant described the inside of the trailer and reported that there was at least one firearm present.

A few days later, a state search warrant was procured from a state judge in Hamblen

County. A photograph of the trailer was attached to the warrant application and after the warrant was issued, it was executed the next day.

The officers executing the warrant parked a short distance from the trailer and did not use either flashing lights or sirens. The officers were also aware that a homicide suspect named “Jose” might also be in the trailer. All officers wore clothing to identify themselves as police officers.

As officers approached the trailer, they heard several people talking and moving around inside. There was a screen door on the trailer but the front door was open as officers approached. Consequently, officers could see individuals in the living room area of the trailer. The officers knocked on the door and announced in English “Police, search warrant.”

The officers waited three or four seconds and then entered the trailer through the unlocked screen door. The officers ordered everyone onto the floor. The individuals complied with the officers’ order and the officers identified Jessie, Jose, and Lucas Pelayo-Landero.

A loaded 9 mm pistol was found on Jessie while Pelayo-Landero was found in possession of a .38 caliber revolver. Pelayo-Landero also possessed two counterfeit alien registration receipt cards and a counterfeit social security card.

After arrests were made, the police determined that Pelayo-Landero was in the United States illegally and notified the INS of his presence. Pelayo-Landero was interviewed in Spanish by an INS agent and after waiving his constitutional rights, he admitted to his illegal alien status and his possession of both firearms and drugs.

Pelayo-Landero was charged with numerous violations of federal law and he filed a motion to suppress physical evidence but this motion was denied. Pelayo-Landero subsequently pled guilty to the indictment but, as part of a plea agreement, he reserved his right to appeal the denial of his motion to suppress pursuant to Fed. R. Crim. P. 11(a). Pelayo-Landero was sentenced to prison and he perfected a timely appeal to the 6th Circuit.

The first issue considered on appeal

was whether the search warrant complied with the 4th Amendment and adequately described the trailer to be searched. Pelayo-Landero argued that the district court erred in denying his motion to suppress evidence because the: (1) search warrant was constitutionally defective because it failed to describe the premises to be searched with sufficient particularity; and (2) officers entering his residence during the service of the search warrant violated the “knock and announce rule.”

Pelayo-Landero argued that the warrant was deficient under the 4th Amendment because neither the warrant nor the supporting affidavit accurately described the place to be searched. The warrant specified that the place to be searched was 1418 Mae Collins Road. Pelayo-Landero argued that the trailer was in “all likelihood 1412 Mae Collins Road, Lot #3.” Moreover, Pelayo-Landero maintained his trailer was not even on Mae Collins Road.

The 6th Circuit acknowledged that no search warrant shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. An error in description does not automatically invalidate a search warrant. Instead, the test for determining whether a search warrant described the premises to be searched with sufficient particularity was not whether the description was technically accurate in every detail. Instead, the description must be sufficient “to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched.”

The 6th Circuit applied these principles to Pelayo-Landero’s case and ruled that he did not argue that there was an inaccuracy in the description of the mobile home. Instead, Pelayo-Landero merely suggested that its address “is in all likelihood 1412 Mae Collins Road, Lot #3.” The court concluded that this descriptive language was not included in the warrant, nor was it necessary.

The particularity requirement was met because the description included specific directions from an identifiable point to the

mobile home park where the trailer was located. Once inside the park, the warrant described the particular trailer by: color, exterior trim, and a wooden deck. Additionally, the warrant included an unusual feature of the trailer, the number 954 displayed under a window air-conditioner on the right end of the trailer. Finally, the agents even attached a photograph of the trailer to the affidavit.

Consequently, the 6th Circuit found that even if Pelayo-Landero's speculation on the actual address was accurate, such conjecture was immaterial to the officers' reasonable effort to identify the mobile home.

The 6th Circuit then addressed the knock and announce violation alleged by Pelayo-Landero. Absent exigent circumstances, the 4th Amendment requires the police to knock and announce their presence before forcibly entering the location to execute a search warrant.

While 18 U.S.C. § 3109 does not apply to state agents serving state search warrants, the common law knock and announce rule is governed by the 4th Amendment's reasonableness inquiry. Accordingly, officers must wait "a reasonable period of time," after a knock and announce, before physically entering a residence. What is "reasonable" depends on the particular circumstances of the situation in question.

The 6th Circuit found that the knock and announce requirement was sufficiently complied with when officers immediately entered the premises after knocking and announcing their presence. Forcible entries without an announcement of purpose and a refusal of admittance had been approved where: (1) there would be a danger to the officer; (2) there would be a danger of flight or destruction of evidence; (3) a victim or some other person is in peril; or (4) it would be a useless gesture such as when the person within already knew the officer's authority and purpose.

Pelayo-Landero asserted that the police did not wait a reasonable amount of time before entering the trailer after knocking and announcing. Moreover, the government did not contend that the officers waited a reasonable amount of time. Instead, the

government alleged that the existing exigent circumstances excused their failure to wait a reasonable amount of time before entering.

The 6th Circuit found that the forcible entry in this case was reasonable. All of the officers were dressed as police officers and had badges displayed on their uniforms. The officers knocked and announced their presence as well as their purpose to execute the warrant. Following this announcement, the agents waited three or four seconds before entering the unlocked screen door.

The court found that the officers were justified in their actions because they knew that: at least one firearm was present in the home; there were drugs in the home that could have easily been disposed of; and there might have been a homicide suspect in the home. Accordingly, the court affirmed the denial of Pelayo-Landero's motion to suppress.

Sanford v. Yukins, 288 F.3d 855 (6th Cir. 2002).

Annette Sanford and Carolyn Wilson were sharing a home in 1990 where they were both caring for children that they had each borne. Among those children were Sanford's 9 year old daughter, Lori, and Wilson's 11 year old son Michael. These two, as well as the other children living in the home, had been beaten and psychologically terrorized by both Sanford and Wilson.

At some point, Michael and Lori were forced to engage in sexual intercourse while Sanford and Wilson watched. According to Michael, Sanford was present in the bedroom at the beginning and throughout most of the ordeal. Moreover, while the sexual intercourse was occurring, Sanford left and returned with tea for Wilson to drink while their children were forced to have sex.

According to Michael, Sanford neither stopped the act nor did she encourage it. However, Sanford did not assist her daughter while Lori was yelling for Michael to stop and trying to kick him away.

Lori agreed that Sanford did nothing "other than be present." Lori's testimony essentially confirmed that Sanford was present in the bedroom but that she said and did nothing to encourage or to stop the sexual activity.

After these incidents of sexual abuse

came to light, both Sanford and Wilson were charged with and tried on two counts of first degree criminal sexual conduct under Michigan law. Before jury deliberations, Sanford moved for a directed verdict arguing that no evidence was adduced against her other than that she was “merely present” in the room while the sex act took place. The trial court denied Sanford’s motion.

Under Michigan law, in order to be convicted of aiding and abetting, the state must prove that the: (1) underlying crime was committed by either the defendant or some other person; (2) defendant performed acts or gave encouragement which aided and assisted the commission of the crime; and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement.

The jury convicted both women, Sanford was unsuccessful on direct appeal, and she filed a § 2254 petition. The district court was unable to locate any evidence in the record that Sanford had “assisted or encouraged the principal offense” and therefore granted Sanford habeas relief.

The Warden appealed to the 6th Circuit. The first question confronted by the court was whether Sanford’s claim was cognizable in federal habeas. The Warden asserted that the district court was precluded from reaching the merits of Sanford’s petition because the trial court already had concluded, as a matter of state law, that in light of Sanford’s duty to protect, her mere presence was sufficient to establish aiding and abetting. Consequently, the Warden maintained that this was not a sufficiency of the evidence case but instead was a case in which the state court determined that an overt act was not an element of the offense where a parent/child relationship exists.

The 6th Circuit rejected this argument and found that a habeas petition may not be dismissed based on the state trial court’s decision that mere presence may be enough whenever a defendant has a duty to act but does not. The Michigan Court of Appeals expressly refused to uphold this proposition. Instead, the court referred the issue to the legislature. Accordingly, the 6th Circuit

concluded that Sanford’s habeas petition was cognizable in federal court.

The 6th Circuit next analyzed whether there was sufficient evidence to support Sanford’s conviction. The Supreme Court has cautioned that the sufficiency standard must be applied with explicit reference to the substantive elements of the criminal offense defined by state law. In rendering its opinion, the district court relied on the testimony of both children that Sanford neither touched them nor said anything. Instead, both children merely agreed that Sanford was present during their sexual encounter. The district court concluded that Sanford’s silent presence was insufficient to support a conviction for aiding and abetting as defined by state law.

The district court concluded that the second element required to prove aiding and abetting, i.e., that the “defendant had given assistance or encouragement,” required an overt act. However, the 6th Circuit ruled that this conclusion was error. What is essential to prove an element, like the question of whether a given element is necessary, is a question of state law. Thus, under the “assistance or encouragement” prong of an aiding and abetting claim, whether silent presence is synonymous with mere presence and whether an overt act is required to prove encouragement is a determination that properly must be left to the state courts.

Moreover, the court also concluded that the district court’s equation of “mere presence” with “silent presence” was inherently flawed. An aider and abettor that is present during a bank robbery may be silent throughout the commission of the crime but his demeanor provides moral support that is recognizable to and relied upon by the principal. Such acts may be silent and may not be overt, but may still amount to more than “mere presence.”

Accordingly, the 6th Circuit ruled that the only question that should have been considered by the district court was whether any evidence supported a conclusion that Sanford’s presence during the crimes was, although silent, something beyond “mere presence. . . indeed, assistance and encouragement.”

For the following reasons, the 6th

Circuit held that a jury could have concluded, beyond a reasonable doubt, that Sanford, despite her silence, rendered assistance and encouragement to Wilson: (1) the assault took place in Sanford's bedroom that she shared with Wilson; (2) Sanford was present in the bedroom when Wilson called the children into the room, thus supporting an inference that the decision to perpetrate the abuse had been jointly made; (3) Sanford appeared to have been awake and fully aware while the events unfolded; and (4) Sanford and Wilson beat the children on a regular basis and Sanford told Michael not to say anything about the sex acts because "a fish doesn't get caught if he keeps his mouth shut."

The 6th Circuit found that the state court decision that sufficient evidence existed to support Sanford's conviction was neither contrary to clearly established Supreme Court precedent nor an unreasonable application of that law. Consequently, the 6th Circuit reversed the district court's grant of habeas relief.

United States v. Taylor, 286 F.3d 303 (6th Cir. 2002).

Taylor pled guilty to entering the United States without permission after being deported in violation of 8 U.S.C. § 1326(b)(1). Taylor's base offense level was driven by USSG § 2L1.2(b)(1) which mandates a base offense level of 8. However, because Taylor entered the country after being deported following his conviction for an "aggravated felony," his offense level was increased by 16. After Taylor's offense level was reduced for acceptance of responsibility and his criminal history category of IV was factored in, his sentencing range was 57-71 months.

Taylor moved the district court for a downward departure based on the arguments that: (1) his criminal history category overstated the seriousness of his past conduct; and (2) the three-fold increase in his offense level overstated the "seriousness of his offense and the harm caused by it." The district court granted Taylor's downward departure by moving his criminal history category from IV to III. However, the district court refused to reduce Taylor's offense level.

The district court reasoned that the guidelines took into account the seriousness of

the underlying felonies by setting out the circumstances under which a downward departure would be appropriate because of the nature of the predicate felonies. Under USSG § 2L1.1, comment. (n.5), a downward departure might be warranted where the: (A) defendant had only one previous felony conviction; (B) previous felony was not a crime of violence or a firearms offense; **and** (C) term of imprisonment imposed for that felony was not more than one year.

Because Taylor was convicted of more than one felony and one of those felonies resulted in a sentence of more than one year, the district court ruled that Taylor was ineligible for a downward departure from his offense level. Taylor appealed and argued that the district court incorrectly concluded that he was ineligible for a downward departure because he did not meet two of the three criteria set forth in Application Note 5. The government responded that the district court's failure to depart was an unreviewable exercise of discretion.

The 6th Circuit found that a district court's discretionary decision not to depart downward is unreviewable as long as the district court understands that it has discretion to depart. However, when the district court interprets the guidelines to prohibit a departure, that determination is reviewable. Because the district court had interpreted Application Note 5 to prohibit a departure, the 6th Circuit reviewed the decision of the district court to not depart in this case.

A district court can exercise its discretion to depart from the guidelines when a: (1) defendant's case falls outside of the heartland of the applicable guideline range because the case presents a factor that was not taken into account by the Sentencing Commission or (2) factor is present in a degree or form not contemplated by the guidelines. However, a defendant may not receive a departure based on the presence of a factor already taken into account in the guidelines.

The 6th Circuit held that a defendant who does not qualify for a departure under Application Note 5 was not eligible for a departure on the ground that his earlier felony conviction was not sufficiently serious to

bring him within the heartland. Accordingly, the 6th Circuit affirmed the district court.

Moss v. Hofbauer, 286 F.3d 851 (6th Cir. 2002).

Moss was charged in Michigan with first degree murder for his role in the killing of Darrell Manley. Moss was sentenced to life imprisonment and he appealed his conviction. One of his claims on appeal was that his counsel was ineffective.

The Michigan Court of Appeals affirmed Moss's conviction and the Michigan Supreme Court denied Moss's request for leave to appeal. Moss collaterally attacked his conviction seeking a new trial on the basis of newly discovered evidence and he requested an evidentiary hearing to develop his ineffective assistance of counsel claim. The newly discovered evidence consisted of an affidavit by a co-defendant, Thomas, which was signed two years after the trial. In the affidavit, Thomas claimed that he was the only person who fired the gun at Manley.

The trial court denied Moss's motion after concluding that the affiant's version of the confrontation could have been discovered through the exercise of reasonable diligence by Moss's trial counsel, Modelski. Modelski did not call Thomas as a witness at Moss's trial because at that time, Thomas would have only admitted that he fired only two of the four bullets that were fired at Manley.

The trial court also rejected Moss's ineffective assistance of counsel claim. Moss was unsuccessful in the direct appeal of his collateral attack and in 1997, he filed a § 2254 petition. In this petition, Moss claimed, among other things, that he was deprived of the effective assistance of counsel. The district court dismissed the other claims raised in the petition but conducted an evidentiary hearing on the ineffective assistance of counsel claim.

The evidentiary hearing was limited to "the issue of ineffective assistance of counsel regarding counsel's failure to cross-examine key prosecution witnesses, investigate and present possible defenses, and conceding Moss's guilt in her closing argument."

At the evidentiary hearing, Thomas testified that he fired all four shots at Manley and then threw the gun in the grass as he fled

the crime scene. Thomas also admitted that he was the one who said "I killed him, man" as he ran down an alley.

However, Thomas had severe credibility problems as he had previously told police that he fired just two shots into Manley. Thomas claimed that he made this statement after the officers said that they did not believe him and they told him that they would allow him to go home if he signed the statement.

According to Thomas, he did not hear any shots fired after he fled the scene and any inconsistency with a prior statement that he made to the police was the result of his fear of going to jail and instructions that he received from the police.

Moss also testified at the evidentiary hearing that Thomas fired all four shots at Manley and then Thomas fled. Moss claimed that after remaining at the scene of the shooting for about a minute, he and co-defendant Gould ran back to Moss's apartment. Moss insisted that he did not say anything to Gould while they were running. However, there were independent witnesses that testified that Moss told Gould, while they were running down an alley, that "he is dead, man, I killed him."

According to Modelski, she never questioned Moss about what occurred when Manley was shot. However, Moss claimed that he told Modelski that "I didn't do the shooting, that Mr. Thomas did the shooting."

Modelski testified that Moss consistently maintained that Gould had fired the gun and that she did not remember Moss telling her that Thomas also shot Manley. Modelski stated that she did not hire an investigator, interview any witnesses prior to trial, or attempt to locate other people who might have observed what occurred.

Instead, Modelski limited her actions to consulting with the attorneys for co-defendants, visiting the crime scene, and reviewing the discovery. Modelski also informed Moss of the state's guilty plea offer and Moss rejected the offer despite her recommendation that he accept it.

According to Modelski, her trial strategy was based on raising a reasonable doubt about the credibility of the eyewitnesses. However, despite this

approach, she made an intentional choice not to cross-examine either of them.

Modelski decided that the testimony of one of the witnesses that he overheard Moss's "on the run confession" of killing a man was inherently unbelievable and that any cross-examination would have drawn more attention to this testimony. Furthermore, Modelski believed that the cross-examination of the other witness by co-defendant Gould's counsel made any additional cross-examination unnecessary.

The district court found that Thomas was not a credible witness and that Moss was not deprived of the effective assistance of counsel and denied his petition. Moss then filed a timely appeal to the 6th Circuit.

The AEDPA prohibits a federal court from granting a writ of habeas corpus to a person in custody pursuant to a state court judgment with respect to a claim that was adjudicated on the merits in state court unless the adjudication of the claim: (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A federal court may grant a writ of habeas corpus under § 2254(d)(1)'s "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides the case differently than the Supreme Court has on a set of materially indistinguishable facts."

In contrast, § 2254(d)(1)'s "unreasonable application" clause provides two different bases for habeas relief. The first possibility occurs if "a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts." The second relief that is available under this provision is if the state court decision "either unreasonably extends or unreasonably refuses to extend the legal principle from Supreme Court precedent to a new context." The proper inquiry for an unreasonable application analysis is whether

the state court's application of clearly established federal law was objectively unreasonable.

The AEDPA further constrains a federal habeas court by establishing a presumption that a state court's determination of a factual issue is correct mandating that "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

The AEDPA also places new restrictions on a district court's ability to conduct an evidentiary hearing. When a petitioner pursues a claim with proper diligence in the state court but is unable to develop its factual basis, a district court is empowered to order an evidentiary hearing to develop the factual record. However, where the petitioner does not pursue a claim with the proper diligence, the district court is barred from conducting an evidentiary hearing to develop the factual record.

According to *Strickland v. Washington*, 466 U.S. 668 (1984), in order to prevail on an ineffective assistance of counsel claim, the defendant must first show that the performance of his counsel was "below an objective standard of reasonableness." Next, the defendant must show that counsel's deficient performance prejudiced the defendant. The *Strickland* standard requires an individualized inquiry into defense counsel's performance.

However, in very limited circumstances, an irrebuttable presumption of prejudice applies. This irrebuttable presumption would surface when "there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronin*, 466 U.S. 648 (1984).

These circumstances would include the complete absence of counsel or the denial of counsel at a critical stage of the defendant's trial. Moreover, if counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of 6th Amendment rights that makes the adversarial process itself presumptively unreliable. Finally, there are some occasions when although counsel is available to assist the accused during trial, the likelihood that

any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. This would include a situation where counsel was appointed at the last minute to conduct a trial for which he was not prepared.

Applying these Supreme Court holdings to Moss's case, the 6th Circuit found that Moss was not denied the right of counsel at a critical stage of his trial. Moreover, this case did not present a situation in which Moss's surrounding circumstances prevented the possibility of Modelski from effectively representing Moss's interests. Finally, the court found that Moss's counsel did not "entirely fail to subject the prosecution's case to meaningful adversarial testing."

The court held that the *per se* reversal rule announced by the Supreme Court in *Cronic* can only be applied where the constructive denial of counsel and any associated collapse of the adversarial system was imminently clear. The court found that those circumstances were not presented in this case because Modelski's performance was clearly not the equivalent of being physically and mentally absent as required by *Cronic*.

Instead, Modelski's preparation for trial included meeting with Moss before the preliminary examination, attending the preliminary examination, visiting Moss several times in jail, consulting with attorneys for co-defendants, visiting the scene of the shooting, and reviewing the records from the police department, which she obtained after drafting a discovery order. Modelski encouraged Moss to accept the guilty plea offer that the state had presented. Moreover, during the trial, Modelski reserved her right to make an opening statement, cross-examine several witnesses, and she made a closing argument.

Because this case did not fit within the requirements of *Cronic*, the 6th Circuit proceeded to evaluate Moss's ineffective assistance of counsel claims through the two-prong test elucidated in *Strickland*. Moss contended that Modelski's failure to make an opening statement was both objectively unreasonable and prejudicial. However, the 6th Circuit ruled that a trial counsel's failure to

make an opening statement does not automatically establish ineffective assistance of counsel. In this case, co-defendant's counsel made an opening statement in which he discussed issues that applied to both Gould and Moss such as the burden of proof and credibility of witnesses.

Modelski's decision not to make an opening statement at that point also prevented her from disclosing her trial strategy before the government presented its case. Furthermore, an opening statement was unnecessary at the conclusion of the government's proof because Modelski did not offer any evidence or present any witnesses.

Moss next claimed that Modelski's failure to cross-examine key witnesses constituted ineffective assistance of counsel. However, Modelski's testimony at the evidentiary hearing indicated that her decision not to cross-examine the witnesses was a strategic one. Modelski considered the testimony to be inherently unbelievable and thought cross-examination would simply focus attention on Moss's alleged admission.

Thus, the court found that Modelski's strategic choice was "virtually unchallengeable because she made it after considering the relevant law and facts." Modelski also decided not to cross-examine eyewitness Purdie because of the fine job that Gould's counsel had done during his cross-examination. The 6th Circuit concluded that Modelski's decision not to cross-examine Purdie did not violate Moss's 6th Amendment right to the effective assistance of counsel. Even if the decision was ill-advised, Moss failed to establish a reasonable probability that his trial would have been different if Purdie was cross-examined by Modelski.

Finally, Moss argued that his counsel's failure to investigate and pursue a theory that Thomas was the only person who shot Manley was ineffective assistance of counsel. According to Moss, if his counsel had interviewed Thomas, called him as a witness, and elicited testimony that he had fired all of the bullets, the result likely would have been different.

However, the 6th Circuit rejected this argument because "Moss's contention overlooks the fact that, according to Modelski,

she had no reason at the time of the trial to believe that Thomas was the sole shooter.” Modelski testified that Moss repeatedly told her that Gould had fired the gun after Thomas fled, and that she did not remember Moss informing her that Thomas also shot Manley.

The district court had previously found Thomas’s testimony to be incredible because of the numerous inconsistencies between his testimony at the evidentiary hearing and the affidavit that he executed two years after the trial. The 6th Circuit concluded that “we find no reason to substitute our judgment for the credibility determination of the magistrate judge who had the opportunity to observe Thomas’s testimony and assess his demeanor on a witness stand.” “Given that Thomas would have been subject to impeachment if he had testified at Moss’s trial and that the magistrate judge found Thomas to lack any credibility, no reasonable probability exists that the result at trial would have been different if Moss’s counsel had interviewed Thomas prior to trial, and then called him as a witness.” Therefore, the decision of the district court dismissing Moss’s § 2254 petition was affirmed.

Cooley v. Coyle, 289 F.3d 882 (6th Cir. 2002).

In 1996, Cooley was on leave from the Army and he and two of his friends, Dickens and Horonetz, threw a large chunk of concrete off a bridge as Wendy Offredo and Dawn McCreery were passing below along I-77 in Akron. The concrete hit Wendy’s car, forcing her to pull over. The three men went down and offered a ride so the women could call for help. After driving the women to a nearby mall to use a telephone, the men took the women to a field where they were raped, beaten and murdered by Cooley and Dickens.

The next day, the women’s bodies were found and the Summit County Coroner concluded that Wendy and Dawn had died of multiple blows to the head and strangulation was also determined to be a contributing cause of Wendy’s death. The Coroner also concluded that both women had oral and vaginal intercourse before dying.

Cooley was indicted for, among other things, aggravated murder which include three specifications of aggravating circumstances.

Cooley waived his right to a jury trial and was tried by a three judge panel. The panel found Cooley guilty of all counts and specifications.

After conducting a mitigation hearing, the panel returned a unanimous verdict, finding, beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances and recommended the death penalty. Cooley timely appealed and his conviction was affirmed on direct appeal.

Cooley then sought post-conviction relief but was unsuccessful. An Ohio appellate court found that most of Cooley’s post-conviction claims were barred by *res judicata*. However, the appellate court addressed Cooley’s ineffective assistance of counsel claims on the merits but denied him relief. Cooley appealed to the Ohio Supreme Court but the court declined to review Cooley’s appeal.

Cooley’s request to reopen his direct appeal was also denied after an Ohio appellate court found that his claims were procedurally defaulted and that he offered no cause for filing his application to reopen within ninety days of the enactment of Ohio App. R. 26(B). The Ohio Supreme Court affirmed this judgment and Cooley then filed a § 2254 petition in October 1996.

In Cooley’s § 2254 petition, he claimed that he was denied the effective assistance of both trial and appellate counsel and that he was denied a meaningful opportunity to litigate his federal claims in state court. The district court denied Cooley’s § 2254 petition and he then appealed to the 6th Circuit.

After the merit briefs were filed, the 6th Circuit expressed a tentative view that “Cooley had not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2) and (3) with respect to any of the issues raised in his brief. Consequently, the court directed Cooley to show cause why his request for a certificate of appealability should not be denied.

The 6th Circuit concluded that under the AEDPA, an appeal from the denial of a writ of habeas corpus may not be taken unless a circuit justice or judge issues a certificate of appealability. A certificate of appealability may not issue unless “the applicant has made a substantial showing of the denial of a

constitutional right.” Moreover, an appellate court can reject an issue if the procedural default doctrine applies.

However, this determination has two components, “one directed at the underlying constitutional claims and one directed at the district court’s procedural holding.” When the district court denies a habeas petition on procedural grounds alone, a certificate of appealability should issue when the applicant “shows that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

After reviewing the seven issues raised by Cooley in his brief, the 6th Circuit concluded that there were only two issues as to which a certificate of appealability should issue: (1) whether the Ohio Supreme Court failed on direct appeal to correct the trial court’s errors in weighing the aggravating and mitigating factors; and (2) whether Cooley’s trial counsel provided ineffective assistance. As to the remaining issues raised in Cooley’s brief, the court found that none met the standards for granting a certificate of appealability and they were not considered by the court.

The first issue considered by the 6th Circuit was whether the Ohio Supreme Court’s reweighing of the aggravating circumstances and mitigating factors leading to his death sentence was erroneous. In *Clemons v. Mississippi*, 494 U.S. 738 (1990), the Supreme Court confirmed that the United States Constitution does not prohibit reweighing or harmless error analysis as a cure for weighing errors. Although not required to do so, once it elects to reweigh, the state appellate court must give each defendant an individualized and reliable sentencing determination based on the defendant’s circumstances, his background, and crime.

Cooley was convicted of the aggravated murder of both Wendy and Dawn. For each victim, Cooley was charged with purposely killing her with prior calculation and design and with purposely killing her in the course of an enumerated felony--kidnapping, rape, and aggravated robbery. Finally, an aggravating circumstance was alleged that the murder was committed to escape detection for other crimes.

Before sentencing, the three judge

panel made the state elect upon which count for each victim the court would impose sentence. The state elected the felony murder count for each victim. The three judge panel also found that the course of conduct specification for each count was duplicative, so it considered only one such specification.

The Ohio Supreme Court initially determined that the trial court erred in several respects in its re-weighing decision. First, the Ohio Supreme Court concluded that the trial court erred in combining and collectively considering the aggravating circumstances of both murders. Moreover, the Ohio Supreme Court also determined that certain specifications should have been merged. Finally, the Ohio Supreme Court also found that the panel should not have considered mitigating factors that were not raised by Cooley.

The Ohio Supreme Court then turned to the question of whether the aggravating circumstances outweighed the mitigating factors. The court concluded that the mitigating factors, including Cooley’s physical and mental history as well as his military record and lack of a prior criminal record, tended to suggest that Cooley may have been less responsible for his acts than most people. However, the court found that the mitigating factors were outweighed, beyond a reasonable doubt, by the aggravating circumstances of rape and kidnapping.

The 6th Circuit found that the Ohio Supreme Court followed the dictates of *Clemons* in that it gave individualized consideration to Cooley’s circumstances, his background, and the crime. Consequently, the court ruled that the Ohio Supreme Court’s decision was neither “contrary to” nor did it involve an “unreasonable application” of clearly established federal law as determined by the United States Supreme Court. Instead, the Ohio Supreme Court was properly allowed to reweigh under *Clemons*, and it considered all factors that *Clemons* set out as part of the reweighing analysis.

The next issue that the 6th Circuit considered was whether Cooley’s trial counsel was ineffective. In order to show that counsel was ineffective, the petitioner must demonstrate that counsel’s performance was

deficient in that it fell below an objective standard of reasonableness and also that counsel's deficiencies prejudiced his defense.

Cooley maintained that trial counsel was constitutionally ineffective for failing to object to the trial court's separate weighing of duplicative aggravating factors. The Ohio Supreme Court acknowledged the underlying weighing error but concluded that Cooley did not raise the issue in the court of appeals and that the error did not affect the panel's verdict.

The 6th Circuit ruled that the evidence of the aggravating circumstances of Cooley's offenses was overwhelming. Moreover, the Ohio Supreme Court corrected the trial court's error in failing to merge the aggravating circumstances and upon independent reweighing, still concluded that the properly admitted evidence overwhelmingly proved that the aggravating circumstances outweighed, beyond a reasonable doubt, the mitigating factors.

The court also considered a number of other of Cooley's allegations about his trial counsel's shortcomings and held that because of the overwhelming evidence of Cooley's guilt, he was unable to demonstrate any prejudice as a result of counsel's alleged deficient performance. Consequently, the ineffective assistance of counsel claims were all rejected and the 6th Circuit affirmed the denial of Cooley's § 2254 petition.

United States v. Lukse, 286 F.3d 906 (6th Cir. 2002).

Scott Lukse and Joshua Hight entered guilty pleas to violating federal drug laws. The plea agreements that Lukse and Hight entered into were identical and both required the government to file a motion for a downward departure if, in the sole discretion of the government, the defendants provided substantial assistance. It was undisputed that both Lukse and Hight provided the government with assistance. Lukse's cooperation led to the arrest and indictment of at least three individuals who the government would not have known about absent his help. Similarly, Hight provided the government with important information previously unknown to them.

After Hight and Lukse entered their guilty pleas and cooperated with the government, but prior to their sentencing hearing, both men were seen smoking a joint in jail. Both Lukse and Hight admitted this to the government and as a result, the government notified their attorneys that it would not be filing motions for a downward departure. The government maintained that as a result of their drug use, both Lukse and Hight had lost their credibility and usefulness as trial witnesses.

Both Lukse and Hight moved the district court to compel the government to file downward departure motions. However, the district court denied the motions after reasoning that the government had retained complete discretion to determine whether substantial assistance had been rendered.

Both Lukse and Hight appealed to the 6th Circuit. USSG § 5K1.1 allows the sentencing court to depart from the guidelines if the government files a motion indicating that a defendant has provided it with substantial assistance in the investigation **or** prosecution of another person who has committed a crime. In many plea agreements, the government refers to the possibility of a § 5K1.1 motion but ultimately reserves unilateral discretion to determine whether the motion is appropriate.

The 6th Circuit had previously ruled that courts may only review the government's refusal to file the motion to determine whether the refusal was based on unconstitutional motives. However, while the court will not permit the review of the government's decision to not file a substantial assistance motion for bad faith, the court will also not allow the government to openly breach plea agreements.

The 6th Circuit held that although the government clearly considered the defendants' adherence to the plea agreement with respect to the prosecution of other suspects, the defendants could satisfy their obligations under the agreement in other ways. The government was required to file downward departure motions if it determined that the defendants provided substantial assistance in the prosecution **or** investigation of other suspects. Therefore, under the terms of the

plea agreement, cooperation during either phase of a case was sufficient to warrant the filing of a motion.

Nonetheless, the government argued that the court was unable to review its decision with regards to the investigation of other suspects because no motion was filed. However, the 6th Circuit stated that a finding of substantial assistance is a condition precedent to the filing of a motion. Similarly, the failure to file a motion is the result of a finding, not a finding in itself. For example, a motion may not be filed because of a conscious decision that substantial assistance has not been rendered. On the other hand, the motion may not be filed because the government in fact never made any decision as to whether substantial assistance was rendered.

Although the government has complete discretion to determine if the defendants rendered substantial assistance, the agreement still imposes certain restraints. First, the government had to determine whether substantial assistance had been rendered. The government could not simply leave this question unanswered. Secondly, if substantial assistance was rendered and the government decided not to file the motion, it had to establish that the defendants breached their plea agreements. Third, if the government determined that substantial assistance had been rendered in either the prosecution or the investigation of other suspects, and they did not breach the agreement, it was required to file the motion.

The 6th Circuit ruled that the government could not ignore its responsibilities under the plea agreement. Therefore, the court found that the government did not carry its burden to show that the defendants breached the plea agreements with respect to the investigation of other suspects. Absent this proof, the government was bound by the plea agreement and was required to file a downward departure motions.

Instead, the government's subsequent failure to file a downward departure motion breached the plea agreement. Consequently, the case was remanded for a new sentencing hearing and the government was ordered to

file downward departure motions commensurate with the defendants' cooperation.

United States v. Humphrey, 287 F.3d 422 (6th Cir. 2002).

The Caribbean Gang Task Force conducted an 18 month investigation into the drug distribution activities of Henry Eaton and Tyronne Cromity. Over the course of the investigation, the government made controlled buys from both individuals and intercepted phone calls and pages made by them to Humphrey. The task force never made any controlled buys from Humphrey, never witnessed any drug deals involving Humphrey, and never observed drugs in Humphrey's possession.

Nevertheless, Humphrey and many others were indicted by a federal grand jury in Cleveland with numerous violations of federal narcotics, firearms, and money laundering laws. All defendants charged, except Humphrey and Morrow, entered into plea agreements with the government.

The testimony at the trial revealed that Humphrey distributed cocaine to Eaton approximately 10-12 times during the time-frame of September 1996 through March 1997. Moreover, court authorized wiretaps on the phones of some of the co-conspirators revealed that shortly after Eaton would arrange the sale of cocaine to third parties, Eaton would page Humphrey with the appropriate codes to purchase the cocaine.

Cromity also testified that Humphrey supplied him with between seven and nine kilograms of cocaine. Humphrey's phone records, coupled with information intercepted from Humphrey's pager indicated that on many occasions Cromity paged Humphrey seeking to purchase cocaine after which Humphrey called Cromity to make payment arrangements.

Morrow was acquitted while Humphrey was convicted of conspiring to distribute cocaine, unlawful possession of a firearm by a convicted felon, and conspiring to commit money laundering. The district court imposed a mandatory 240 month term of imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) and a 10 year term of supervised release.

On appeal, Humphrey raised numerous instances of alleged prosecutorial misconduct which the 6th Circuit quickly rejected. Humphrey next alleged that the district court erred by: (1) not conducting an inquiry into the actual conflict of interest between Humphrey and his counsel; and (2) improperly reviewing Humphrey's *Batson* challenge.

Eight months after Humphrey's trial, Dudley discovered a conflict of interest between himself and Humphrey. This discovery prompted Dudley to file a motion to withdraw as counsel. The district court refused to conduct a hearing on this issue but instead referred to a transcript that was taken at a hearing conducted by a different district court judge to resolve this issue. The district court concluded that it would be patently unfair to leave Humphrey unrepresented at the sentencing hearing particularly in light of the fact that post-trial motions had been fully briefed and objections to the presentence investigation report were already filed.

Consequently, the district court informed Humphrey that he was free to fire Dudley and secure another attorney or proceed to sentence *pro se*. Humphrey did neither and now complained that the district court's denial of additional time for him to retain new counsel and its failure to inquire into the facts of the alleged conflict were error.

Normally, a trial court has a duty to inquire into the nature of the conflict of interest at such time as it becomes aware of a potential or an actual conflict of interest. The failure of a trial court to conduct such an inquiry mandates reversal if the defendant can show that the conflict adversely affected his counsel's performance.

The 6th Circuit rejected Humphrey's argument and held that the district court properly denied Humphrey's motion for a hearing on this issue. Humphrey's argument was rejected because (1) this case was distinguishable from the *Glasser v. United States*, 315 U.S. 60 (1942) line of cases, as those cases involved an attorney's joint representation of multiple defendants which was not the situation presented in this case; (2) it was only after trial that a conflict presented itself; (3) after a hearing on this issue, a district court judge asked Humphrey whether

he wished Dudley to continue as his counsel and Humphrey responded affirmatively; and (4) the district court judge properly reviewed the transcript of the hearing conducted by a different district court judge and concluded that an additional hearing was unnecessary and no additional time was required to permit Dudley to retain new counsel.

Humphrey next argued that the government improperly used its peremptory challenges during *voir dire* against two African-American members of the jury venire. According to Humphrey, Juror #4 and alternate juror #30 were stricken in a systematic effort to exclude African-Americans from the jury.

To be successful under *Batson v. Kentucky*, 476 U.S. 79 (1986), the opponent of the strike must first establish a *prima facie* case by demonstrating that the strike was made on the basis of race. A successful showing by the opponent results in a shift of the burden of production to the strike proponent to set forth a race neutral basis for its challenge. In this regard, the government's proffered reason need not be persuasive or even plausible, so long as it was neutral. Finally, the district court must determine whether the opponent has proved purposeful racial discrimination, mindful that the ultimate burden of persuasion regarding racial motivation rests with and never shifts from the opponent of the strike.

Humphrey assigns error to the district court's implementation of the third prong of the *Batson* analysis. Humphrey maintained that the district court failed to evaluate the government's explanation and the circumstances of the case to determine whether purposeful racial discrimination had occurred. In this case, Humphrey maintained that the district court erred by failing to conduct any inquiry. The government responded that Humphrey did not make a proper request in the district court.

The 6th Circuit found that a defendant who fails to insist upon and receive a definitive ruling from the trial court on a *Batson* challenge may be said to have waived any objection for purposes of appeal. However, the 6th Circuit reviewed the issue and concluded that the explanations given by

the government as to why it struck the two jurors were race neutral and therefore rejected Humphrey's *Batson* challenge.

The next issue considered by the 6th Circuit was whether the district court erred by failing to instruct the jury to return a special verdict on the drug type for which Humphrey was responsible. Humphrey maintained that where a defendant was charged with a multiple drug conspiracy for which the maximum statutory penalty for each drug was different, and a jury returns only a general verdict of guilty, that defendant was entitled to be sentenced under the lesser statutory penalty.

Although this is an accurate statement of the law, the 6th Circuit rejected Humphrey's argument that he was entitled to a special jury verdict. In this case, the grand jury indicted Humphrey for being involved in a conspiracy to distribute crack cocaine, powder cocaine, or both. Thus, regardless of whether a jury determined that Humphrey conspired to distribute crack cocaine, powder cocaine, or both; both substances were Schedule II substances, therefore he still would have been subject to sentencing under 841(b)(1)(C) and subject to the same statutory penalty.

Humphrey's final argument was that the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) by failing to instruct the jury to find drug quantities beyond a reasonable doubt. The first task for the 6th Circuit was to determine what standard of review to apply to Humphrey's *Apprendi* challenge. Humphrey was sentenced in 1999, prior to *Apprendi*, and only made a formal *Apprendi* objection in his appellate brief in 2001.

Because Humphrey's appeal was pending at the time *Apprendi* was decided, the court found that he was entitled to the retroactive application of a new rule of criminal prosecution. Where a defendant raises a cognizable *Apprendi* challenge in the district court and raises it again on appeal, the *Apprendi* issue must be reviewed *de novo*. In contrast, where a defendant failed to raise the issue in the district court, the *Apprendi* issue must be reviewed for plain error.

Humphrey could not have known at the time of his sentencing hearing that

Apprendi would be decided a year later. Nonetheless, Humphrey objected at the sentencing hearing to both the amount of drugs attributed to him as well as the standard of proof required to support that amount. This objection was reiterated as a formal *Apprendi* objection on appeal.

The 6th Circuit found that Humphrey's attorney may have conceded that, under then current law, it was within the district court's authority to find drug quantities based on the preponderance of the evidence standard. Nevertheless, it was apparent from the record that Humphrey's attorney challenged the propriety of that standard. Although Humphrey's attorney articulated his objection on the basis of sufficiency of the evidence, he urged the district court to consider only those facts that were proved to the jury beyond a reasonable doubt.

The court ruled that the preservation of a constitutional objection should not rest on magic words; instead, it suffices that the district court should be apprised of the objection and offered an opportunity to correct it. Although Humphrey's attorney never used the words "*Apprendi*," the court concluded that the substance of the objection to the drug quantity determination, combined with his objection to the standard of evidence to be used, was sufficient to notify the district court of the basis for the objection and sufficient to preserve the issue for *de novo* review on appeal.

Humphrey maintained that the quantity of drugs attributable to him as relevant conduct was an element of the offense, and therefore should properly have been submitted to the jury for determination beyond a reasonable doubt. The consequence of this alleged violation, Humphrey maintained, was that he was subjected to an increased penalty for conduct not charged in the indictment based on the district court's finding, by a preponderance of the evidence, that he was responsible for 50 to 150 kilograms of cocaine.

The government conceded that the district court's sentencing of Humphrey offended *Apprendi* as applied by 6th Circuit precedent. Although Humphrey was indicted for, and convicted of violating 21 U.S.C. §

841(a)(1) and § 841(b)(1)(A), the jury's failure to determine, beyond a reasonable doubt, the quantity of drugs for which Humphrey should be held responsible properly required him to be sentenced only under 21 U.S.C. § 841(b)(1)(C).

Section 841(b)(1)(C) provides for a maximum penalty of 20 years except where, as here, the defendant has a prior felony drug conviction, in which case the defendant is subject to a 30 year maximum statutory penalty. Because the district court's 20 year sentence did not exceed the 30 year statutory penalty, on this basis alone, Humphrey could state no error.

However, the 6th Circuit's *Apprendi* analysis did not end with a finding that Humphrey's sentence did not exceed the prescribed statutory maximum penalty. The court arrived at this conclusion because a defendant may nevertheless state an *Apprendi* violation when he can demonstrate that the district court's factual determination resulted in an increase of the range of statutory penalties applicable to the defendant for purposes of sentencing.

The 6th Circuit surveyed its cases that construed *Apprendi* and found that the rationale underlying each of its decisions was not that the mandatory minimum sentence of one provision was less than or equal to the statutory maximum of another, but a concern that the district court was compelled to impose a sentence that, but for its drug quantity determination, it would have not been obligated to impose.

In this case, the low end of the guideline range was 235 months and this sentence was not considered by the district court because it believed that the 20 year statutory mandatory minimum sentence set forth in § 841(b)(1)(A) removed its authority to consider a lesser sentence. The jury in this case should have determined, beyond a reasonable doubt, the quantity of drugs for which Humphrey was criminally responsible. In the absence of such a finding, the district court, consistent with 6th Circuit precedent, should have sentenced Humphrey under § 841(b)(1)(C) which sets forth a 30 year statutory maximum penalty but no mandatory minimum penalty. Accordingly, the 6th

Circuit vacated Humphrey's sentence and remanded the case to the district court for resentencing.

United States v. Henning, 286 F.3d 914 (6th Cir. 2002).

Henning was the vice president and general counsel at First Federal Savings & Loan Association of Toledo. Henning also served on the board of directors at the bank and was a permanent member of the loan committee. During Henning's tenure, a number of questionable loans were made with his knowledge and approval. Henning was charged with numerous violations of federal law and after the government presented its case-in-chief, the district court overruled Henning's Rule 29 motion. Furthermore, Henning did not object to the jury charge.

Henning was convicted of conspiracy to defraud the United States, two counts of bank fraud, and three counts of misapplication of bank funds. After the verdict, Henning filed a timely motion for judgment of acquittal and a motion for a new trial. The district court set-aside Henning's conspiracy conviction based on the sufficiency of the evidence but denied relief on the substantive counts. Four months after the district court set-aside the conspiracy conviction, Henning filed another motion for a new trial on the substantive counts.

The district court granted Henning's second motion for a new trial on the substantive counts in light of its submission of a *Pinkerton* instruction to the jury. The court reasoned that the *Pinkerton* instruction might have influenced the jury's verdict on the substantive charges and because there was insufficient evidence to send the conspiracy charge to the jury, this instruction should not have been before the jury. The court found that it erred by not vacating the substantive convictions when it reversed the conspiracy conviction.

The government appealed the order vacating the substantive counts and the 6th Circuit reversed after finding that the district court was without jurisdiction to consider Henning's second motion for a new trial.

After sentence was imposed, Henning appealed. Henning maintained on appeal that that insofar as: (1) the jury rendered a general

verdict finding him guilty of conspiracy and of certain substantive offenses; and (2) he was acquitted of the conspiracy conviction in a post-trial order, the substantive convictions must be vacated because it was impossible to know whether the jury convicted him legally (based on his own acts), or illegally (based upon the acts of others).

The government countered that the submission of the *Pinkerton* charge was not erroneous because there was sufficient evidence to support that Henning was a member of the conspiracy to defraud First Federal. Alternatively, the government argued that the error, if any, was not plain because: the sufficiency question was a close one; that Henning was not prejudiced by the alleged error because the jury clearly would have convicted him of the substantive charges in the absence of the *Pinkerton* instruction; and that giving the *Pinkerton* instruction did not constitute a miscarriage of justice.

When a criminal defendant has failed to object below, he must demonstrate that the error was “plain” as defined by Fed. R. Crim. P. 52(b) before the court may exercise jurisdiction to correct the error. The Supreme Court has established a four-part test that a defendant must meet in order to establish plain error. A defendant must show that: (1) an error occurred in the district court; (2) the error was plain, i.e. obvious or clear; (3) the error affected defendant’s substantial rights; and (4) this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

The 6th Circuit found that the district court erred in its order in which Henning was acquitted of the conspiracy conviction by failing to recognize the problems with a *Pinkerton* instruction in light of its ruling. The *Pinkerton* rule is necessarily premised on the existence of a conspiracy. When the district court reversed the conspiracy conviction, it failed to consider that, pursuant to the *Pinkerton* instruction, the jury may have convicted Henning on the substantive counts only because they believed he was guilty of a conspiracy.

Due to the close relationship between the substantive and conspiracy counts which was created by the *Pinkerton* instruction, an

automatic consideration of the viability of the substantive convictions should have been undertaken by the district court when Henning was acquitted of the conspiracy conviction in the post-trial order. Consequently, the 6th Circuit found that the district court erred by failing to undertake such a consideration.

Next, the 6th Circuit found that the district court’s error was plain. Plain errors are “limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection or that strike at the fundamental fairness, honesty, or public reputation of the trial.” The court found that it was axiomatic that, absent evidence of a conspiracy, one cannot be convicted for the crimes of another. Therefore, the 5th and 6th Amendments require the government to prove, among other things, the personal guilt of Henning.

The 6th Circuit next concluded that the district court’s plain error also affected Henning’s substantial rights. The jurors originally convicted Henning on a conspiracy charge which the district court later determined was not supported by sufficient evidence. It was therefore only logical and likely that the jurors may have convicted Henning on the substantive counts based upon *Pinkerton* liability. Courts presume that jurors “attend closely to the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” The problem with the substantive convictions was that the jury could have closely followed the jury instructions and convicted Henning based upon the actions of his associates.

Lastly, the 6th Circuit ruled that the plain error affected the fairness, integrity, or public reputation of the proceedings. The plain error standard does not require a showing of actual innocence. Instead, courts should correct a plain error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

“An important tenet of our criminal justice system is that a defendant is innocent until proven guilty beyond a reasonable doubt. When it is uncertain whether a defendant was convicted by the appropriate standard, the

integrity of the judicial system was undermined.” The district court’s error in failing to address the *Pinkerton* issue runs contrary to the administration of justice and substantially and adversely affects the integrity of the judicial process.

Consequently, the 6th Circuit found that Henning had satisfied the plain error standard and the convictions for the substantive offenses were vacated.

Stapleton v. Wolfe, 288 F.3d 863 (6th Cir. 2002).

Stapleton was indicted by an Ohio grand jury for two counts of burglary and two counts of theft. Prior to Stapleton’s trial, a co-defendant, Ryan Studer, spoke with the police on two occasions. On the first occasion, Studer stated that he drove to the location of the alleged burglary with Stapleton and Danny Foreman (the Henery residence) but remained in the car while Stapleton and Foreman burglarized the house.

During this first interview, Studer denied any involvement in a second burglary and suggested that Stapleton and Foreman burglarized the second residence (the Dishon residence) after he went home.

However, during a second interview, Studer acknowledged entering the Dishon residence and he admitted removing a gun from the house. The police recorded both of Studer’s interviews. At Stapleton’s trial, the owners of both homes that were burglarized were unable to implicate Stapleton. When Studer was called as a witness, he stated that he did not remember the burglaries and did not recall making any statements to the police. Studer also indicated that Stapleton was not with him during the burglaries. The prosecution then sought to admit the audio-tapes of Studer’s prior conversations with the detectives.

Stapleton’s counsel objected and argued that he was not given an opportunity to cross-examine Studer during the interviews and that no corroborating circumstances existed to establish the trustworthiness of Studer’s taped statements. The trial court determined that Studer was “unavailable” and that his statements were against his interests, but delayed ruling on the admissibility of those statements until Foreman testified.

Foreman testified that Stapleton had driven him and Studer to the Dishon residence, kicked in the back door, and ransacked the house. Foreman later testified that after the Dishon burglary, the three men burglarized the Henery residence.

After Foreman testified, the trial court ruled that there was sufficient evidence to corroborate Studer’s taped statements and permitted their admission into evidence. The jury found Stapleton guilty on all counts and he was unsuccessful on direct appeal. Stapleton then filed a § 2254 petition in which he alleged that the trial court erred in admitting tapes of Studer’s interviews but the district court denied Stapleton habeas relief after concluding that any error was harmless.

Since this case was governed by the AEDPA, the 6th Circuit noted that a federal court was prohibited from reviewing a state court adjudication unless the adjudication “involved a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. In determining whether a decision was “contrary to” or “involved an unreasonable application of” clearly established federal law, federal courts may only look to the “holdings, as opposed to the *dicta*, of the Supreme Court’s decisions as of the time of the relevant state-court decision.”

One of the hallmarks of the 6th Amendment is the defendant’s right to confront and cross-examine witnesses who testify against him. Moreover, statements by a non-testifying accomplice that implicate a defendant are presumptively unreliable and their admission violates the Confrontation Clause. To overcome the presumption of unreliability attached to non-testifying accomplice confessions, the prosecution must show that the proffered statements bear “an adequate indicia of reliability.”

The 6th Circuit concluded that Studer’s taped statements contained no such indicia of reliability. Those portions of Studer’s statements that inculpated Stapleton did not inculcate Studer. Instead, Studer’s statements shifted responsibility for the crimes to Stapleton; thus, the relevant portions of Studer’s taped statements were not “against

his interest.”

Moreover, Studer’s statements differed in several material respects from Foreman’s testimony. Accordingly, the court concluded that the admission of Studer’s taped statements violated Stapleton’s Confrontation Clause rights.

The 6th Circuit next reviewed the Ohio trial court’s decision that any error was harmless. In habeas review, error is harmless unless it “had a substantial and injurious effect or influence in determining the jury’s verdict.” If the matter is so evenly balanced that a court has grave doubt as to the harmlessness of the error, it should treat the error, not as if it were harmless, but as if it affected the verdict.

In determining whether the trial court’s error was harmless, the 6th Circuit examined the following factors: (1) the importance of the witness’s testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case.

The 6th Circuit ruled that although Foreman’s testimony corroborated portions of Studer’s taped statements, those statements were of obvious importance to the prosecution’s case. Moreover, Stapleton’s counsel had no opportunity to cross-examine Studer during the police interviews and without Studer’s statements, the prosecution’s case was weak. Consequently, the 6th Circuit’s decision hinged upon its finding of whether Studer’s statements were cumulative.

An Ohio appellate court previously determined that Studer’s statements were cumulative. However, the 6th Circuit held that this conclusion was contrary to federal law that was clearly established by the Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991).

In *Fulminante*, the Court determined that the admission of the defendant’s coerced confession was not harmless error. The Court noted that “it is clear the jury might have believed that the two confessions reinforced and corroborated each other.”

The 6th Circuit observed that

Stapleton’s jury could also have believed that Foreman’s statements and Studer’s taped statements “reinforced and corroborated each other.” Consequently, by finding that Studer’s taped statement was cumulative, the 6th Circuit held that the Ohio appellate court confronted a set of facts that were materially indistinguishable from those in *Fulminante* but nevertheless arrived at a result different from the precedent established in *Fulminante*.

Fulminante involved multiple confessions and Stapleton’s case also involved multiple accomplice statements. Therefore, the 6th Circuit ruled that the Ohio appellate court reached a decision that was “contrary to” clearly established federal law.

The court then concluded that the admission of the statements under the five factors previously set forth demonstrated that there was a substantial and injurious effect or influence in determining the jury’s verdict. Consequently, the court ruled that the Confrontation Clause violation was not harmless and reversed Stapleton’s conviction.

Calvert v. Wilson, 288 F.3d 823 (6th Cir. 2002).

In 1996, an Ohio grand jury returned an indictment charging Vincent Calvert and Erwin Mallory with aggravated robbery and aggravated murder with a death penalty specification. Although Calvert and Mallory were indicted together, they were tried separately with Calvert’s trial occurring first.

At Calvert’s trial, the prosecution introduced the statement given by Calvert to police officers after his arrest. According to Calvert, he spent three to four hours playing cards and drinking whiskey with Robert Bennett on February 4, 1996 in Bennett’s apartment. When Calvert left Bennett’s apartment, he went to the apartment of Paul Bates from whom he borrowed money. Calvert then claimed to have traveled to the apartment of an acquaintance who lived next door to Bennett. While Calvert was in this apartment next to Bennett’s, Mallory knocked on the door and asked Calvert to accompany him next door to see Bennett. Mallory claimed that Bennett had stolen \$100.00 from him the night before.

When Bennett, a white man, saw Mallory at his door, he immediately began

yelling at Mallory, using a racial epithet and telling him to get out. Calvert told police officers that less than thirty seconds after Mallory and Calvert entered Bennett's apartment, Mallory pulled a hatchet from his field jacket and started hitting Bennett on the back of the head. After several hits, Mallory stopped the beating and even helped Bennett into a chair at the kitchen table.

However, Mallory began beating Bennett again with a stick. At this time, Bennett asked Calvert to help him get Mallory out of his house. After the stick broke, Mallory picked up a butcher knife and slashed Bennett's throat. When Calvert observed this, he got up from his chair, told Mallory that he was crazy, and ran from the scene. Because of the amount of blood that spewed when Bennett's throat was slashed, Calvert's clothing was covered with blood.

After leaving Bennett's apartment, Calvert stated that he took a cab to a bar in Byesville, Ohio where he stayed until closing. Calvert then accompanied a friend home, and the next morning, he took a cab to the apartment next to Bennett's where he confronted police officers. When Calvert arrived, he was still dressed in the blood spattered clothes that he wore the night before. Calvert told the officers that he neither killed Bennett nor knew anything about Mallory's plan to kill him. However, Calvert was placed under arrest and taken to the police station where he gave a statement.

At Calvert's trial, the prosecutor called Mallory as a witness but he asserted his 5th Amendment privilege against self-incrimination and refused to testify. Over defense counsel's objection, the trial court then admitted a tape recording of a confession given by Mallory to the police after his arrest. In this confession, Mallory described a different version of the events that resulted in Bennett's death.

Mallory admitted that he and Bennett argued the day before the murder about money that Mallory claimed that he won from Bennett in a card game. However, a neighbor broke up the argument after telling Mallory to put down the ax he was using to threaten Bennett. Mallory failed to explain to the officers why he had taken an ax to Bennett's

apartment. Mallory also told the police that on the day of the murder, Mallory and Calvert left Bennett to go to Mallory's apartment where they armed themselves with knives and a hammer for the purpose of killing Bennett.

According to Mallory, the two men returned to Bennett's apartment where they both attacked Bennett. Mallory said Calvert used a hammer and a paring knife while Mallory used a butcher knife and Bennett's walking stick. Mallory stated that after he and Calvert had beaten and stabbed Bennett multiple times, Calvert slashed Bennett's throat. A coroner testified that Bennett died from multiple stab wounds to his trunk, chest, and abdomen. However, Bennett did not die from trauma to the head.

A jury found Calvert guilty as charged and he was sentenced to life imprisonment. On appeal, Calvert argued that the trial court erred by allowing Mallory's tape recorded statement into evidence. An Ohio appellate court found that the admission of Mallory's statement did not violate the Confrontation Clause and affirmed Calvert's conviction. The appellate court ruled that Mallory's statement was properly admitted as a statement against the interest of the declarant under Ohio R. of Evid. 804(b)(2). The Ohio Supreme Court refused to review this case and Calvert filed a § 2254 petition.

In his habeas petition, Calvert raised the Confrontation Clause issue and the district court found that the trial court's admission of Mallory's statement violated his right to confront witnesses. However, the court also ruled that the error was harmless.

The 6th Circuit recognized that the Supreme Court has long held that a non-testifying co-defendant's statement that implicated a defendant was presumptively unreliable and its admission violated the Confrontation Clause. To overcome this presumption of unreliability, a prosecutor seeking admission of a non-testifying accomplice's statement must demonstrate that the statement bears an adequate indicia of reliability.

In this case, the Ohio appellate court rejected Calvert's Confrontation Clause claim in a brief opinion that provided little analysis of federal law. The Ohio court began its

Confrontation Clause analysis by stating that the standard for admission of Mallory's confession was governed by an Ohio evidentiary rule governing statements against interests and by a decision of the Ohio Supreme Court in *State v. Gillian*, 635 N.E.2d 1242 (1994). Absent from the appellate court's decision was a discussion and/or an analysis of federal law including *Lee v. Illinois*, 476 U.S. 530 (1986).

Under strikingly similar circumstances, the Ohio Supreme Court in *Gillian*, and the United States Supreme Court in *Lee*, reached different conclusions regarding an alleged Confrontation Clause error. In both cases, the trial court admitted the confession of a non-testifying accomplice who under post-arrest police questioning, admitted his guilt, demonstrated first hand knowledge of the crimes, and whose testimony was corroborated by other witnesses.

Whereas the *Gillian* court found no Confrontation Clause error under these circumstances, the United States Supreme Court held in *Lee*, that "on the record before us, there is no occasion to depart from the time honored teaching that a co-defendant's confession inculcating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation."

With this backdrop, the 6th Circuit concluded that the district court correctly concluded that, under federal law, the admissibility of Mallory's statement depended upon what, if any, particularized guarantees of trustworthiness surrounded the making of the statement. Contrary to the state courts' decisions, the district court found no such guarantee surrounding the statement made by Mallory.

Instead, like the accomplice's statement in *Lee*, Mallory's statement was the product of an in-custody interrogation for his involvement in, and knowledge of, serious crimes. Like the accomplice in *Lee*, Mallory made his statements under the supervision of governmental authorities, in response to police officers' leading questions which were asked without any contemporaneous cross-examination by adverse parties.

Consequently, the 6th Circuit agreed with the district court that the Ohio appellate court's decision was "contrary to" clearly established Supreme Court precedent when it determined that the admission of Mallory's statement did not violate the Confrontation Clause. However, for the purpose of federal habeas review, constitutional error that implicates trial procedures is considered harmless unless it had a substantial and injurious effect, or influence in determining the jury's verdict.

The 6th Circuit reviewed the record and concluded that Mallory's tape-recorded confession was the most compelling piece of evidence against Calvert. The jury did not hear from anyone but Mallory that Calvert caused the death of Bennett with prior calculation and design. Consequently, the court concluded that Mallory's statement may have been precisely the evidence that convinced the jury that Calvert "purposely and with prior calculation and design, caused the death of Bennett." Accordingly, the court ruled that the admission of Mallory's statement had a substantial and injurious influence in determining the jury's verdict and Calvert's conviction was reversed.

United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576 (6th Cir. 2002).

Cor-Bon manufactures firearm ammunition and 26 U.S.C. § 4181 imposes an 11% excise tax on all taxable sales of ammunition by such manufacturers. Cor-Bon was indicted on 16 counts of tax evasion under 26 U.S.C. § 7201 for allegedly evading its § 4181 tax liability during each calendar quarter from 1991 through 1995.

Each count in the indictment alleged that Cor-Bon "wilfully attempted to evade and defeat a tax imposed under this title or the payment thereof on the ammunition sales that we due and owing from Cor-Bon [for the quarter and calendar year in question] in violation of 26 U.S.C. §§ 4181 and 7201."

After the jury was impaneled, Cor-Bon filed a motion to dismiss wherein it attacked the indictment as fatally defective because it did not allege an affirmative act of evasion. The district court denied the motion as untimely and meritless.

Although the indictment did not allege

an affirmative act of evasion, Cor-Bon learned soon after the indictment that a disgruntled ex-employee would be testifying that Cor-Bon filed false tax returns, destroyed sales invoices, and maintained a second false set of records to conceal the true amount of its ammunition sales.

During the jury trial, Cor-Bon cross-examined this disgruntled employee regarding her allegations and otherwise presented a robust defense. Moreover, both sides argued Cor-Bon's alleged affirmative act of evasion to the jury. Nonetheless, the jury convicted Cor-Bon and the corporation appealed.

On appeal, Cor-Bon renewed the argument made in the district court that the indictment was defective because it did not allege an affirmative act of evasion. The 6th Circuit concluded that an indictment adequately charges an offense if it: (1) includes the elements of the offense intended to be charged; (2) notifies a defendant of what he must be prepared to meet; and (3) allows a defendant to invoke a former conviction or acquittal in the event of a subsequent prosecution.

Moreover, in an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words fully, directly, and expressly, without any uncertainty, set forth all of the elements necessary to constitute the offense intended to be punished.

In *Spies v. United States*, 317 U.S. 492 (1942), the Court held that an affirmative act of evasion includes, but is not limited to, "conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income or any conduct, the likely effect of which would be to mislead or to conceal." Subsequent cases to *Spies* have held that an affirmative act of evasion is an element of an offense under § 7201. Consequently, to sustain a conviction under § 7201, the government must prove: (1) a tax deficiency; (2) wilfulness; and (3) an affirmative act of evasion or an attempt of evasion.

The 6th Circuit ruled that although an affirmative act constitutes an element of a §

7201 case, the court was not required to decide whether an indictment under § 7201 must allege an affirmative act because any deficiency in the indictment, if any, constituted harmless error.

Cor-Bon did not claim that it lost any of the protections intended to be furnished by the requirement that an indictment allege all of the elements of the offense charged. This protection seeks primarily to ensure that an accused is reasonably informed of the charge made against him so that he could prepare a defense. The court concluded that the record indicated that Cor-Bon knew which specific affirmative acts it was accused of committing and pursued a vigorous defense to attempt to show that it had not committed them.

The court recognized that there has been a "drift of the law away from the rules of technical and formalized pleading and that convictions are no longer reversed because of minor and technical deficiencies which do not prejudice the accused." Because Cor-Bon failed to establish that it suffered prejudice from any alleged error, any defect in the indictment was harmless error. Consequently, Cor-Bon's conviction was affirmed.

El-Nobani v. United States, 287 F.3d 417 (6th Cir. 2002).

El-Nobani is a Jordanian citizen who is also a legal resident in the United States. In December 1996, El-Nobani was indicted on a variety of federal offenses. Eventually, El-Nobani pled guilty to conspiracy to traffic food stamps and to alien-harboring.

During the plea colloquy, the district court did not inform El-Nobani of the possible deportation consequences attendant to his plea. In 1997, El-Nobani was sentenced to serve 2 years probation with four months of house arrest and; however, he appealed neither his conviction nor his sentence.

In 1999, the INS served El-Nobani with a notice to appear which had the effect of initiating deportation proceedings against him. El-Nobani consulted with an immigration attorney who advised him to attack his guilty pleas. Consequently, El-Nobani filed a § 2255 motion in which he sought to withdraw his guilty pleas which he claimed were neither knowingly nor voluntarily entered. The district court stayed the INS proceedings and

scheduled an evidentiary hearing. El-Nobani testified at the hearing and the district court granted his § 2255 petition and enjoined the INS from deporting El-Nobani.

On appeal, the 6th Circuit first confronted the issue of whether El-Nobani was procedurally barred from withdrawing his guilty pleas on collateral review. Generally, the voluntariness and intelligent nature of a guilty plea can be attacked on collateral review only if first challenged on direct appeal. However, there are two exceptions to this rule. Under the first exception, a procedural default is excused if the defendant is actually innocent. The second exception requires that a petitioner demonstrate cause and actual prejudice.

In this case, El-Nobani did not appeal either his conviction or sentence and only sought to withdraw his plea when he filed a § 2255 motion. Consequently, El-Nobani did not satisfy the first exception because there was no allegation that he was innocent. Instead, El-Nobani relied on the second exception which required a showing of cause and prejudice.

The 6th Circuit ruled that there was no evidence to support a finding of prejudice. The court arrived at this conclusion because there was no evidence to suggest that El-Nobani would not have plea guilty if he had been aware of the deportation consequences of his pleas.

El-Nobani argued that a lack of awareness of the deportation consequences made his pleas involuntary and unknowing. However, the 6th Circuit ruled that a defendant need only be aware of the direct consequences of the plea and the trial court was under no constitutional obligation to inform the defendant of all possible collateral consequences of the plea. El-Nobani maintained that deportation was not a collateral consequence because under the IIRIRA of 1996, the INS has little, if any, discretion to grant deportation relief for those individuals who were convicted of certain crimes.

The 6th Circuit held that although the IIRIRA of 1996 restricted the INS's ability to grant certain discretionary relief from deportation proceedings, "there is no

indication that the INS has ceased making this sort of determination on a case-by-case basis." Moreover, the automatic nature of the deportation proceeding did not necessarily make deportation a direct consequence of his guilty plea.

A collateral consequence is one that remains beyond the control and responsibility of the district court in which the conviction was entered. While the 6th Circuit has not yet specifically addressed whether deportation consequences are a direct or collateral consequence of a plea, it is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.

Therefore, the fact that El-Nobani was unaware of the deportation consequences of his plea did not make his plea unknowing or involuntary. Moreover, El-Nobani did not satisfy an exception to the procedural bar by showing either actual innocence or cause and prejudice. As a result, the decision of the district court vacating El-Nobani's convictions and enjoining the INS was reversed.

Caldwell v. Bell, 288 F.3d 838 (6th Cir. 2002).

In 1981, Tony Climer went with his parents to a community dance hall in Chester County, Tennessee. While there, Climer was seen talking to Richard Caldwell and his son Virgil. Climer was last seen alive about 11:15 P.M., and no one saw him leave the dance hall. In the days after Climer's disappearance, Richard Caldwell gave conflicting stories about his relationship with Climer.

Seven weeks later, Richard Caldwell was arrested for public drunkenness and taken to the Chester County Jail. Virgil was also detained and the next morning, he lead police officers to an isolated area where the partial skeletal remains of Climer were found.

Subsequent to this discovery, Richard Caldwell confessed to killing Climer. Caldwell stated that Climer had provoked him, first by making sexual advances and later by "slapping" whiskey into Caldwell's "one good eye." As a result of this provocation, Richard Caldwell stated that he went crazy, shot Climer with a shotgun, disposed of Climer's body, and burned Climer's clothing.

At Caldwell's trial, the prosecutor

implored the jurors to convict Caldwell of first degree murder. Concerning the element of malice, the prosecution stated that “not only does it come – can it come from the use of a weapon, but that blowing away a human being is the definition, the embodiment of the word malice.”

To compound this somewhat misleading argument, the jury instructions informed the jury that malice is an essential element of both first and second degree murder. Moreover, the court instructed that “when the defendant is shown to have used a deadly weapon, and death is clearly shown to have resulted from its use, it is a presumption of law that the killing was done maliciously, that is, with the malice necessary to support a conviction of murder . . .”

Caldwell was convicted of first degree murder and sentenced to death. Caldwell was unsuccessful in both a direct appeal of as well as a post-conviction attack on his conviction. Consequently, Caldwell filed a § 2254 petition but it was also dismissed. Caldwell then appealed to the 6th Circuit.

The Warden conceded that the jury instruction was constitutionally infirm but instead maintained that any error was harmless. The court found that in a criminal trial, it is an elementary principle of due process that every element of the crime must be proven by the prosecution beyond a reasonable doubt.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979) the Court ruled that an instruction that tells a jury to presume any element of a crime without evidence is unconstitutional because the “14th Amendment guarantees prohibit a state from shifting to the defendant the burden of disproving an element of the crime charged.” Moreover, the Supreme Court has made clear in subsequent cases that an instruction that a jury should presume malice from the use of a deadly weapon falls under this unconstitutional prohibition.

The 6th Circuit concluded that when faced with a *Sandstrom* error, the court should not assume that it is harmless but must review the entire case under the harmless error standard. In cases subject to habeas review, this standard dictates that error is not to be deemed harmless if it had a “substantial or

injurious effect or influence in determining the jury’s verdict.”

Consequently, the question presented in this case was refined to be whether the instruction, considered in light of the other instructions in the trial record as a whole, had a substantial and injurious effect on the jury’s verdict. The 6th Circuit concluded that the error was not harmless because as a result of the instructions given, there was a reasonable likelihood that the jurors concluded that the use of a deadly weapon raised a presumption of malice for both first and second degree murder.

Absent this presumption, had a member of the jury entertained a reasonable doubt that the state had proven malice, the juror would have been required to acquit as to first and second degree murder. However, once the faulty instruction was given, a conscientious juror could have entertained a reasonable doubt that the state had proven malice and still voted to convict Caldwell of murder because: the trial judge had told him to presume malice from the use of a gun, the prosecutor indicated that the state had proven all of the elements of first degree murder, and that malice can come from the use of a deadly weapon.

Moreover, the court concluded that the unconstitutional jury instruction trumped Caldwell’s defense of provocation. Once the instruction was given, jurors were unable to fairly consider the defense’s theory of provocation leading to manslaughter because manslaughter would be inconsistent with malice and jurors were instructed to presume malice from the use of a deadly weapon. Accordingly, the district court was reversed and the case was remanded for new trial.

United States v. Crouch, 288 F.3d 907 (6th Cir. 2002).

Crouch pled guilty to conspiracy to operate an illegal gambling business, engaging in a monetary transaction with property derived from specified unlawful activity, and filing a false tax return. The presentence report recommended the grouping of the offenses and the determination of the base offense level by the application of the guideline for the offense of engaging in illegal monetary transactions, USSG § 2S1.2, which

carried the highest base offense level.

Furthermore, based on the value of the funds involved in the financial transactions, the presentence report also recommended the application of the specific offense characteristic found in § 2S1.2(b)(2) to determine the adjusted offense level.

Crouch raised two objections to this sentence calculation: (1) that he should not receive a four level enhancement for his role in the offense; and (2) that because sentencing under the money laundering guideline rather than under the gambling guideline overstated the gravity of his conduct, the district court should depart downward from his offense level.

Consistent with Crouch's argument, the district court imposed only a two level enhancement for his leadership role. Moreover, because Crouch pled guilty to the offense of engaging in a monetary transaction and property derived from specified unlawful activity, the court held that the guideline for that activity, § 2S1.2, was the appropriate guideline.

Because the value of the funds involved in the monetary transactions was greater than \$350,000 but less than \$600,000, Crouch's offense level was increased three levels pursuant to § 2S1.2(b)(2). Crouch did not object to the application of this specific offense characteristic. Finally, the district court denied Crouch's downward departure motion and imposed a 24 month sentence.

On appeal, Crouch claimed that the district court erred in applying the § 2S1.2(b)(2) specific offense characteristic. The 6th Circuit ruled that because Crouch failed to object to the application of this specific offense characteristic, the court would apply a plain error standard of review and would grant relief only if he showed that: (1) an error occurred in the district court; (2) the error was plain; (3) the error affected defendant's substantial rights; and (4) this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

In support of his argument, Crouch contended that only individual transactions whose value was greater than \$10,000 were illegal under 18 U.S.C. § 1957. Moreover,

Crouch maintained that the district court erred by aggregating transactions that had a value of less than \$10,000 to reach the total amount upon which the sentence was calculated because there was only one transaction that exceeded \$10,000.

However, this argument had been previously rejected by the 6th Circuit in an unreported opinion and the court ruled that even if Crouch could show that the district court's aggregation of the transactions was error, it was not plain error inasmuch as it followed existing, albeit unpublished, precedent of the 6th Circuit.

The court next addressed Crouch's claim that the district court erred in denying his motion for a downward departure. An appellate court may not review the refusal of a district court to grant a downward departure if the district court understood the extent of its authority and correctly applied the sentencing guidelines. The 6th Circuit reviewed the transcript of the sentencing hearing and concluded that the district court found no facts or factors in Crouch's case that took it outside of the "heartland," or supported his claim that his guideline sentence was too severe for the offense that he committed. Consequently, the court ruled that it lacked jurisdiction to consider this argument.

United States v. Parson, 288 F.3d 818 (6th Cir. 2002).

Parson pled guilty to distributing more than five grams of crack in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii) as well as unlawful possession of food stamps in violation of 7 U.S.C. § 2024(b)(1). According to the presentence report, Parson's offense level was 25 and his criminal history category was V which yielded a guideline imprisonment range of 100 to 125 months.

Parson's had prior convictions for robbery and felonious assault. Parson's sentencing date for the robbery offense was March 1, 1985, while he was sentenced for the felonious assault offense on March 19, 1985. Parson's received a suspended, concurrent sentence of 3 to 15 years in prison and was placed on probation for five years.

However, on September 24, 1985, Parson's probation was revoked and he was sentenced to serve the suspended sentence.

Parson's was paroled on January 29, 1990 but his parole was revoked on June 21, 1991. Parson's was paroled again on November 16, 1992 but his parole was revoked again on February 15, 1994. Parson's was last paroled on June 15, 1998 and he was on parole when he committed the federal narcotics offense.

The district court rejected the government's argument that Parson should be considered a career offender and imposed a sentence of 100 months. The government filed a timely notice of appeal and the issue presented was whether the district court erred in not treating Parson as a career offender.

USSG § 4B1.1 provides that a defendant is a career offender if: (1) he was at least eighteen years old at the time that he committed the federal offense; (2) the federal offense is a felony that is either a crime of violence or a controlled substance offense, and (3) he had at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Parson did not dispute that he either was 18 years of age at the time he committed the federal offense or that he had two prior convictions that were crimes of violence. The only question was whether the sentences for the two felony convictions were to be counted separately.

Under USSG § 4A1.2(e) all sentences imposed within 10 years before the federal offense was committed are countable. Moreover, sentences of 13 months or more are counted if they were imposed or resulted in incarceration at any time during the 15 years before the instant offense. Under USSG § 4A1.2(k)(1) "in the case of a prior revocation of probation . . . add the original term of imprisonment to *any* term of imprisonment imposed upon revocation . The resulting total is used to compute criminal history points for § 4A1.1(a), (b), or (c), as applicable."

The 6th Circuit examined § 4A1.2(k)(2)(B) to determine the starting date of the counting period on the basis of the length of the combined sentence: "for purposes of determining the applicable time period, use the following: (i) in the case of an adult term of imprisonment totalling more than one year and one month, the date of last release from incarceration on such sentence. . .; and (iii) in

any other case, the date of the original sentence."

Parson argued that under §§ 4A1.2(e) and (k), one of his felony convictions should not be counted as it fell outside of the applicable time period. Parson's argument was that if one of his sentences "were to soak up all of his time in jail due to probation and parole revocations under Application Note 11, the other of his sentences would become "any other case and therefore the time period in § 4A1.2(e) would begin to run at the time of the imposition of the original sentence."

If all of the time Parson was incarcerated was applied to the first sentence, the second sentence, in effect, would be treated as if Parson had served no time at all and would not be counted. The district court adopted this method of calculation and found that only one of the convictions was countable and that Parson was not a career offender.

The 6th Circuit ruled that the district court's analysis was correct if Parson's parole had been revoked only once. However, Parson's parole was revoked on multiple occasions. On each revocation, according the application note, "the additional time sentenced is to be added to the sentence that would create the greatest increase in criminal history points. Therefore, the time added from the first revocation (over 4 years) would apply to only one of the two prior felonies. However, the second time that parole was revoked (and the rule applied again), the additional time (over 1 year) would be applied to the second of the two prior felonies."

Because each of the two sentences would finally be more than one year and one month, both sentences should have been counted. Consequently, the 6th Circuit ruled that Parson was a career offender and his case was remanded for resentencing.

United States v. Martin, 289 F.3d 392 (6th Cir. 2002).

On January 18, 1999 Officers Maurer and Jones of the Covington, Kentucky Police Department were traveling in an undercover car in Covington. The officers observed a woman, Virginia Wagoner, enter a vehicle driven by Timothy Martin. The officers testified that they initially observed Wagoner either standing or slowly walking outside

wearing nothing more than jeans and a short-sleeved shirt. Wagoner was located in front of a parking lot and she was carrying nothing except a cigarette.

According to the officers, the fact that Wagoner was not carrying a purse was significant because prostitutes generally do not carry purses. Moreover, the officers testified that they believed that Wagoner had previously been arrested on prostitution charges.

The officers described the area where they observed Wagoner as one known for prostitution. According to the officers, Wagoner extended her right hand about waist high and waived at Martin's vehicle in a manner that the officers recognized to be a prostitute's hailing of a prospective "John."

After Wagoner entered Martin's vehicle, the two drove away. Based on these facts, the officers suspected that Wagoner was loitering for prostitution and radioed a uniformed officer to stop Martin's vehicle.

After Martin's vehicle was stopped, Maurer removed Wagoner from the vehicle and interrogated her. Wagoner told Maurer that she met Martin, known to her only by his first name, at her brother's house approximately one year earlier. Moreover, Wagoner acknowledged that she had prior convictions for prostitution. Martin was then interviewed and he told Maurer that: he knew Wagoner for two months; he met her on a walk; he did not know Wagoner's name.

While Maurer was questioning Martin, Officer Jones obtained consent from Wagoner to search her person at which time he discovered a condom in her pocket. Wagoner was arrested and charged with loitering for prostitution under Kentucky law. Officer Cook responded to the scene and after Wagoner's arrest, he searched the passenger area of Martin's vehicle and discovered a pistol beneath the rear passenger floor mat.

Because the officers never observed Wagoner turn around or lean over her seat while she was seated in the front passenger seat, they concluded that Martin was carrying the gun and he was charged with the federal offense of possession of a firearm by a convicted felon.

Martin argued in the district court that

the discovery of the firearm was in violation of the 4th Amendment because the: 1) officers lacked reasonable suspicion to stop the car; 2) interrogation of Martin and Wagoner did not create probable cause to arrest Wagoner; and 3) search of the car did not satisfy any exception to the warrant requirement because probable cause did not exist to search the vehicle, nor was the area behind the passenger seat within Wagoner's immediate control.

The district court conducted a suppression hearing and granted Martin's motion to suppress after holding that the officer's lacked probable cause to arrest Wagoner. Consequently, the officers were without authority to conduct the search of Martin's car incident to Wagoner's arrest. The government then appealed to the 6th Circuit.

The 6th Circuit began by recognizing that a *Terry* stop by a officer who is able to point to "specific and articulable facts" justifying his reasonable suspicion that the suspect has been or is about to be involved in criminal activity is not an unreasonable seizure. While the 4th Amendment requires that the decision to stop the individual be based on something more substantial than "inarticulate hunches," the totality of the circumstances must be taken into account in determining the validity of the challenged stop.

The scope of law enforcement activities in an investigative stop depends upon the circumstances that originally justified the stop. Thus, the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But, the detainee is not obliged to respond. Unless the detainee's answers provide the officer with probable cause to arrest, he must then be released.

The 6th Circuit evaluated the legitimacy of an investigative stop by making a two part assessment of its reasonableness. First, the court must determine whether there was a proper basis to stop the individual based upon the officer's awareness of specific and articulable facts that gave rise to a reasonable suspicion. Second, the court must evaluate whether the degree of intrusion into the

suspect's personal security was reasonably related in scope to the situation at hand, judged by examining the reasonableness of the official's conduct given their suspicions and the surrounding circumstances.

The fact that a given locale is well known for criminal activity will not, by itself, justify a *Terry* stop; but it is among the various factors that officers may take into account. The Supreme Court in *United States v. Arvizu*, 122 S.Ct. 744 (2002) made clear that courts must not view factors upon which officers rely to create reasonable suspicion in isolation. Instead, *Arvizu* stressed that courts must consider all of the officers's observations and not discard those that may seem insignificant or troubling when viewed standing alone.

Furthermore, the Supreme Court reiterated that the totality of the circumstances approach allows officers to draw on their own experiences and specialized training to make inferences from and deductions about cumulative information available to them that might well elude an untrained person.

In this case, the officers testified that they believed that Wagoner was engaged in the offense of loitering for prostitution because: 1) her dress and attire were typical of prostitutes; 2) she was in an area known for prostitution activity; 3) they recognized her as a woman who had been previously convicted of prostitution; and 4) she waved in a manner that they identified as being characteristic of a prostitute's means of soliciting customers.

The 6th Circuit found that the combination of these observations, when considered from the perspective of officers with specialized training and familiarity with the behavior of prostitutes, provided reasonable suspicion to justify the stop of Martin's car.

The threshold for probable cause is based upon factual and practical considerations of everyday life that could lead a reasonable person to believe that there was a probability that an illegal act has occurred or is about to occur. The court found that in addition to the factors that supported the officer's reasonable suspicion that Wagoner was loitering for the purpose of prostitution,

Martin and Wagoner provided contradictory answers regarding how they met and how long they had known one another. Moreover, Wagoner knew Martin's name but he did not know her name. The court ruled that all of these factors provided probable cause for the officers to arrest Wagoner for loitering for the purpose of prostitution.

The court then applied *New York v. Belton*, 453 U.S. 454 (1981) in which the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, incident to that arrest, search the passenger compartment of that automobile."

Because the court concluded that the officers could have lawfully arrested Wagoner for a prostitution offense, the officer's search of Martin's vehicle was permissible. Once the officers could conduct a search of the automobile after a lawful custodial arrest of Wagoner, the search of Martin's car was a lawful search incident to her arrest. Therefore, the district court's suppression order was reversed and the case was remanded.

United States v. Moses, 289 F. 3d 847 (6th Cir. 2002).

Moses pled guilty to conspiring to manufacture marijuana in violation of 21 U.S.C. § 846. The presentence report recommended an enhancement of Moses's base offense level pursuant to USSG § 2D1.1(b)(1) because he possessed a firearm in connection with the drug trafficking offense.

The facts surrounding the firearm enhancement present the only salient issue in this appeal. After Moses admitted to agents that he grew marijuana, he consented to a search of his property. A search of Moses' property led to the recovery of several firearms, including a .22 caliber Ruger pistol. Additionally, a shotgun was removed from the gun rack mounted in Moses's pickup truck.

At his sentencing hearing, Moses testified that the weapons in his house and truck were unrelated to this offense. Moses stated that many of the guns were in taped boxes that had been brought to his house to be stored. Moreover, Moses maintained that the firearms were used only for hunting and he regaled the court with tall tales of his hunting racoons with the .22 pistol.

The district court found that Moses might have used his rifles solely for hunting; however, the court did not believe that Moses hunted with the .22 caliber Ruger pistol that was recovered from the house. Thus, the court concluded that it was not clearly improbable that Moses possessed the pistol in connection with the marijuana offense. Consequently, Moses' objection to this enhancement was overruled and he appealed to the 6th Circuit.

The 6th Circuit concluded that an enhancement under § 2D1.1(b)(1) is proper only if the government established, by a preponderance of the evidence, that: (1) the defendant possessed a dangerous weapon; and (2) during the commission of a drug trafficking offense. If the government proves both of these elements, the weapon is presumed to have been connected to the offense. The defendant can rebut this presumption only by showing that it was "clearly improbable that the weapon was connected to the offense."

Moses did not dispute the district court's findings that he possessed several weapons while he was part of the marijuana conspiracy. Moreover, Moses admitted that he used his house to perform acts in furtherance of the conspiracy; including drying and weighing the marijuana once it was removed from the plot of land where it was grown. Consequently, the 6th Circuit ruled that the government met its burden of proving that Moses possessed dangerous weapons during the offense.

However, Moses maintained that he met his burden of showing that any connection between the firearms in his house and the marijuana conspiracy was clearly improbable. In reviewing whether the district court's rejection of Moses' argument was clearly erroneous, the 6th Circuit considered various factors to determine whether the firearms were related to this drug offense, including: the proximity of the firearms to the drugs; the type of firearms involved; whether the firearms were loaded; and any alternative purpose offered to explain the presence of the firearms.

Moses testified that he kept a .22 caliber pistol in his bedroom closet; however, Moses never stated where in the house he

dried and weighed the marijuana. If Moses dried and weighed the marijuana near the bedroom, the pistol would have been reasonably accessible to Moses as he carried out the conspiracy. Consequently, the court ruled that Moses failed to offer evidence showing that the location of the pistol was inconsistent with the firearm having a connection to the marijuana conspiracy.

Moreover, the court found that the .22 caliber pistol is a firearm that a defendant would typically possess in connection with the drug trafficking conspiracy. Furthermore, there was no evidence to show that the .22 caliber pistol was unloaded. Finally, Moses testified that he used the .22 caliber pistol to hunt raccoons. The district court determined that Moses' testimony was incredible on this point and the 6th Circuit agreed that Moses' self-serving testimony was inadequate to justify setting aside the district court's finding. Consequently, the court ruled that the district court properly applied the firearm enhancement found in § 2D1.1(b)(1).

Schoenberger v. Russell, 290 F.3d 831 (6th Cir. 2002).

Schoenberger was charged with, and convicted of having sexual contact with his step-daughters Tracy and Teresa Fraker. The convictions were based solely on the testimony of Tracy and Teresa as there was neither physical evidence nor eyewitness testimony linking Schoenberger to the allegations. Schoenberger denied the allegations and attributed them to Tracy's and Teresa's drug use, juvenile offenses, and desire to get back at him for enforcing parental rules for their conduct. Schoenberger's wife, the mother of Tracy and Teresa, supported his testimony.

Donna Bukovec, a social worker with the Delaware County Department of Human Services, testified concerning two complaints alleging sexual abuse of Tracy and Teresa. According to Bukovec, the first complaint was made in 1984 and in the interviews with Tracy and Teresa, both girls denied that the charges were true. Moreover, Bukovec determined that the charges were "unsubstantiated" because "she did not have enough evidence or history from the girls to substantiate physical abuse or sexual abuse."

The second complaint was received in 1985 and Bukovec testified that the complaint involving Tracy was substantiated because “there was evidence and history given that would substantiate the fact of sexual abuse.”

On cross-examination, defense counsel questioned Bukovec concerning the grounds on which the 1985 complaint were substantiated and elicited the fact that, in her interviews with Tracy and Teresa, Tracy stated that the allegations were true, whereas Teresa continued to deny them. Defense counsel then questioned Bukovec concerning whether she had investigated Tracy’s background and her use of drugs and alcohol. Bukovec stated that her substantiation of Tracy’s claim was primarily based on Tracy’s statements. Moreover, Bukovec admitted that people who have taken drugs can hallucinate or lie.

On redirect examination, the government established that Bukovec was an experienced investigator and that part of her investigations involved assessing the truthfulness of statements by sexual abuse victims. Bukovec testified that she believed Tracy was telling the truth about the abuse.

Nancy Nicolosi was a probation/diversion counselor in the Delaware County Juvenile Court. During direct examination, Nicolosi described the classic profile of female sexual abuse victims. On cross-examination, Nicolosi stated that she believed Tracy when Tracy told her that she had been abused.

Finally, Sheryl Smith, a former investigator for the Delaware County Department of Children’s Services, testified that she first interviewed Tracy and Teresa in 1988 concerning a sexual abuse complaint. On direct examination, Smith described the interview process and the indicators that she looked for to determine if abuse occurred.

The prosecutor then asked Smith if she believed that Tracy was telling the truth concerning the abuse and Smith testified that she thought that Tracy was telling the truth because she had nothing to gain from lying. Defense counsel did not object to any of the testimony offered by Bukovec, Nicolosi, or Smith.

After Schoenberger was unsuccessful on direct appeal, he filed a § 2254 petition

which was denied by the district court. Schoenberger then perfected a timely appeal to the 6th Circuit.

Under the AEDPA, a writ of habeas corpus cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that was: (1) contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or (2) based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The first, and perhaps the most significant issue resolved by the court was the appropriate standard of review to be applied to adjudicate the claims raised in Schoenberger’s habeas petition. Although the propriety of the testimony of these three witnesses was raised in the Ohio appellate court, the court did not directly address this issue.

The 6th Circuit held that in the absence of a state court decision, it was obligated to conduct an independent review of federal law to determine if the state court either contravened or unreasonably applied clearly established federal law. However, “this independent review is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court’s result is not in keeping with the strictures of the AEDPA.”

Because defense counsel failed to object to the testimony of Bukovec, Nicolosi, or Smith, the Ohio appellate court that reviewed this case on direct appeal applied a plain error standard in determining that the admission of the testimony did not prejudice Schoenberger. Consequently, this case presented an issue of whether the state court’s failure to find plain error violated Schoenberger’s constitutional rights.

The 6th Circuit found that many of the responses given by these witnesses were covered by the “invited response doctrine.” It is well accepted law that a party is not permitted to complain of an error that the party invited or induced the trial court to make.

Counsel’s trial strategy appears to have involved obtaining from these witnesses their

admissions that: (1) their assessment of the truth of the victims' allegations was based almost solely on the statements of Tracy; (2) they failed to conduct a sufficient review of Tracy's background, in particular her history of drug and alcohol abuse; (3) abusers of drugs and alcohol are known to lie; and (4) the witnesses either had experience with, or were aware of, cases where children have lied about sexual abuse.

By obtaining these admissions, defense counsel was able to argue that the conclusions of the three witnesses were unreliable because they were based primarily on Tracy's statements. Counsel's failure to object to the admission of this evidence was consistent with the strategy. Given this strategy, the 6th Circuit ruled that the Ohio court of appeal's decision was neither contrary to, nor an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts to this case.

Schoenberger next complained that he was denied due process when the prosecutor elicited information from Schoenberger's wife concerning his alcohol abuse. Moreover, Schoenberger maintained that he was deprived of a fair trial when Tracy Fraker made statements about a domestic violence incident between Schoenberger and his wife.

The Ohio appellate court applied a plain error analysis to these claims and ruled that the evidence did not prejudice Schoenberger. The 6th Circuit noted that only in extraordinary cases will an error in the application of the state rules of evidence rise to the level of a due process violation in a federal habeas proceeding.

Given this rule, the 6th Circuit held that the admission of this evidence did not violate Schoenberger's due process rights. Any prejudice that Schoenberger suffered was minimal in light of the fact that the primary trial issue was the victim's credibility. Therefore, the district court's decision to dismiss Schoenberger's §2254 petition was affirmed.

United States v. Galvan-Perez, 291 F.3d 401 (6th Cir. 2002).

Galvan-Perez pled guilty to unlawful re-entry into the United States after having

been previously convicted of an aggravated felony in violation of 8 U.S.C. § 1326(b). Galvan-Perez's prior convictions were for felony offenses relating to breaking into unoccupied automobiles. After Galvan-Perez served his sentence for the aggravated felonies, he was deported to Mexico. However, Galvan-Perez illegally returned to the United States and he worked as a roofer.

Galvan-Perez's guideline range was 46 to 57 months of imprisonment. However, Galvan-Perez moved for a downward departure based on his work history and the nature of the prior aggravated felony convictions. At the sentencing hearing on November 27, 2000, the district court expressed reservations about granting the downward departure motion. As a result, Galvan-Perez's motion was denied and he was ordered to serve a 46 month sentence.

The judgment and commitment order was filed on December 4, 2000; however, on December 5, 2000, the district court had second thoughts about the sentence that it imposed and it filed an order reducing Galvan-Perez's sentence to 24 months. In that order, the district court found that Galvan-Perez's case was outside of the "heartland" because he was convicted of minor felonies involving property theft from unoccupied automobiles.

The government appealed the district court's change of heart and contended in the 6th Circuit that the district court lacked jurisdiction to resentence Galvan-Perez because it failed to abide by the time limit found in Fed. R. Crim. P. 35(c). Fed. R. Crim. P. 35(c) provides that "the court, acting within seven days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." In this case, sentence was imposed on November 27, 2000 and it was published in the form of a judgment and commitment order on December 4, 2000.

The government maintained that the seven day clock under Rule 35(c) begins to run when the sentence is pronounced in open court and not when it is filed as part of the judgment. However, the 6th Circuit ducked this issue and instead relied on Fed. R. Crim. P. 45(a) to conclude that the district court's actions were timely within the ambit of Rule

35. Rule 45(a) provides that when the rules either prescribe or require action within 11 days, weekends and holidays are excluded time. Thus, after the weekend was excluded in this case, the district court acted six days after the sentence was pronounced in open court.

However, even though the district court's action was timely, the 6th Circuit was troubled by the basis upon which the sentence was reduced. The district court never referred to Rule 35(c) in its order. Instead, the court merely characterized its earlier denial of Galvan-Perez's motion for a downward departure as "robotic" and an instance of "clear error."

The 6th Circuit noted that the power granted by Rule 35(c) to a district court was exceedingly limited. From the record, the 6th Circuit concluded that the district court initially imposed a legal sentence. However, the court then had second thoughts about the sentence it imposed and attempted to invoke its discretion to depart downward. It was obvious that the district court was not acting to correct a clear error, but rather to reflect a "change of heart."

The court concluded that Rule 35(c) does not afford the district court an opportunity to reconsider its interpretation of the guidelines. Moreover, Rule 35(c) was not intended to afford the court the opportunity to change its mind about the appropriateness of the sentence. The error, if any, that the district court sought to correct could not be construed to be arithmetical, technical, or "other clear error." Consequently, the decision of the district court was vacated and the original sentence was reinstated.

Macias v. Makowski, 291 F.3d 447 (6th Cir. 2002).

In 1994, Christopher LaSalle parked his car at a gas station in Pontiac, Michigan. Four passengers were in LaSalle's car and he exited the vehicle to speak with a passenger in a car that was parked in front of his. While LaSalle was out of the car, another car pulled up and a gunman fired three shots at LaSalle.

LaSalle initially identified the shooter as a Hispanic male known to him as "Bontay" with whom he had a physical confrontation two months earlier. However, two days after the shooting, LaSalle informed the police that

the assailant was Bontay who was also known as Alfonso Macias. LaSalle informed law enforcement that an individual with whom he worked, told him that Alfonso Macias was Bontay's legal name.

Eleven days later, during a photo lineup, LaSalle identified Macias as the individual who fired the gunshots. Moreover, at trial, six eyewitnesses identified Macias as the assailant. Macias presented alibi evidence that he was not at the gas station at the time of the shooting. During the prosecutor's rebuttal argument, she intimated that the rebuttal witness did not come forward until shortly before the trial commenced. However, contrary to the prosecutor's representations to the jury, the witness came forward more than five weeks before the trial, as reflected by the notice of alibi filed by Macias.

The jury convicted Macias of assault with intent to commit murder and unlawful possession of a firearm, both in violation of Michigan law. On appeal, the Michigan Court of Appeals concluded that the prosecutor had improperly attacked the credibility of one of Macias's key alibi witnesses "with argument unsupported by the evidence, including argument that was false." Moreover, the Michigan Court of Appeals found that the error was not harmless beyond a reasonable doubt and reversed Macias's conviction. The state appealed and the Michigan Supreme Court remanded the case to the court of appeals for further consideration.

On remand, the court of appeals reversed its earlier decision and held that it was "now convinced that the prosecutor's argument did not contain false or misleading statements of fact, but was a legitimate argument based on legitimate inferences drawn from the alibi witness' testimony."

Macias then filed a § 2254 petition wherein he argued that the prosecutor's statements regarding the alibi witness' testimony constituted prosecutorial misconduct. However, the district court held that Macias was unable to demonstrate that his trial was fundamentally unfair and concluded that even if the remarks were improper, they constituted harmless error because Macias was identified as the shooter by seven eyewitnesses.

Macias appealed to the 6th Circuit which concluded that it was authorized to grant a writ of habeas corpus to a person in custody pursuant to a state court judgment, but only if the adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.”

Macias maintained that he was entitled to the issuance of a writ of habeas corpus because the prosecutor’s statements deprived him of his constitutional right to a fair trial. However, the 6th Circuit found that in deciding whether prosecutorial misconduct mandates the grant of habeas relief, the court must apply the harmless error standard.

Thus, the relevant question was whether the prosecutor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process?” The court applied the following two-step approach to determine whether prosecutorial misconduct violated Macias’s due process rights. The court must first consider whether the prosecutor’s conduct and remarks were improper.

If the court finds that the remarks were improper, it must apply a four-factor test to determine whether the impropriety was flagrant and violative of Macias’s due process rights. The four factors are whether the: (1) conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) conduct or remarks were isolated or extensive; (3) remarks were deliberately or accidentally made; and (4) evidence against the defendant was strong.

The court found that although a prosecutor is allowed to argue reasonable inferences from the evidence, he may not misstate the evidence. Therefore, it was improper for a prosecutor, during her closing argument, to bring to the attention of the jury any fact that was not in evidence and was prejudicial.

The 6th Circuit ruled that the prosecutor’s statements regarding the alibi

witness’ testimony were based on facts that were not in evidence and therefore were improper. Consequently, the court proceeded to apply the four factors to determine whether the misconduct was sufficiently flagrant to violate Macias’s due process rights.

The court held that the statements were misleading and were deliberately made. Therefore, these two factors weighed in favor of Macias’s claim that the prosecutor’s argument violated his due process rights. However the court also ruled that the statements were isolated and the evidence against him was strong.

The court resolved this standoff by relying on strength of the state’s case. The court found that the evidence against Macias was strong because there were seven eyewitnesses who identified him as the assailant. This testimony was also credible because it was based on a close range encounter with the assailant and three of the eyewitnesses knew Macias. Consequently, the court held that the Michigan Court of Appeals’ determination that the prosecutor’s comments did not violate Macias’s due process rights was not objectively unreasonable.

Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002).

In 1984, Gary Mitchell was found nearly dead by customers at a bar in Cincinnati. Two days later, Mitchell died from trauma to his head. More than two months later, Jamison was arrested after being caught, red-handed, robbing a restaurant in Cincinnati.

At the time of his arrest, police found money from the restaurant, jewelry from another robbery, and a gun that Jamison acquired during a third robbery. Jamison was also wearing Pony gym shoes when he was arrested. This was significant because there was a shoe print from a Pony gym shoe found on top of the bar where Mitchell was murdered.

Three months later, police arrested Charles Howell who was Jamison’s alleged accomplice in the Mitchell murder. Howell told police that he and Jamison robbed the bar and that Jamison attacked Mitchell.

Prior to trial, the prosecutor responded

to a defense discovery request by indicating that he was not in possession of any exculpatory evidence. This response was due to a Cincinnati Police Department (CPD) practice of “homicide booking” in which the department would gather inculpatory material into a homicide book that was sent to the prosecutors. However, exculpatory material was excluded from the homicide book. Consequently, the prosecutor claimed that he was unaware of the existence of any exculpatory evidence and did not disclose it as mandated by *Brady v. Maryland*, 373 U.S. 83 (1963).

Jamison was convicted and sentenced to death and he was unsuccessful both on direct appeal and in state post-conviction process. However, after Jamison filed a § 2254 petition, a discovery proceeding ensued and formerly suppressed exculpatory evidence came to light. Because the information had been withheld, Jamison had not raised the *Brady* issue on either direct appeal or in his post-conviction proceeding.

Consequently, the district court conducted a cause and prejudice hearing to determine whether Jamison had waived the *Brady* claim. The district court concluded that Jamison had cause for not pursuing the *Brady* claim in state court. Moreover, the court held that Jamison was prejudiced by the prosecutor’s suppression of evidence. The district court granted Jamison habeas relief and the Warden appealed.

Because Jamison filed his habeas petition prior to the enactment of the AEDPA, he was entitled to have “the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.”

Brady and its progeny held that due process is violated when the prosecution withholds evidence favorable to the accused in a criminal case if the evidence is material to guilt or sentencing. This duty to disclose extends to information in the possession of the law enforcement agency investigating the offense. A habeas petitioner must satisfy the following three elements to establish a *Brady* violation: (1) that the evidence was favorable to him; (2) that it was suppressed (whether

intentionally or not) by the government; and (3) that prejudice ensued.

Jamison maintained that he did not receive 35 documents that the prosecution should have given him prior to his trial. The documents included both directly exculpatory evidence (identifications of possible suspects other than Jamison) as well as information useful for the impeachment of Howell.

Jamison argued that the trial preparation practices of the CPD as well as the Hamilton County Prosecutor’s Office caused evidence material to the defense to be suppressed. The 6th Circuit reviewed this evidence and found that the material was clearly favorable to Jamison and that it was suppressed by the government. The only question over which the court labored was whether the information was material.

The Warden maintained that Jamison’s *Brady* claim should not be reviewed because it was procedurally defaulted. In the 6th Circuit, a four-part analysis is used when the state argues that a federal habeas claim is precluded by the petitioner’s failure to observe a state procedure rule: (1) the court must ascertain whether there is an applicable state procedural rule; (2) the court must determine whether the state courts actually enforce the rule; (3) the court must decide whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim; and (4) if the defendant did not comply with the rule, he must demonstrate that there was cause for him not to follow the rule and that he was actually prejudiced by the alleged constitutional error.

The parties to this appeal centered their arguments on the cause and prejudice determination. In order to show cause, Jamison must provide a substantial reason for the default that is external to him. Moreover, to demonstrate prejudice in this context, Jamison must show that the alleged error “not merely created a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.”

Parallel to this prejudice analysis is the question as to whether the suppressed evidence was material. Prejudice (or the

materiality requirement) for *Brady* purposes requires the petitioner to establish “a reasonable probability that the result of the trial would have been different had the information been disclosed to the defense.”

Jamison maintained in the 6th Circuit that his cause for failing to present his *Brady* claim was that his trial attorneys were not given the exculpatory information. The 6th Circuit accepted this as an adequate basis for not complying with the state procedural rule.

The court then proceeded to assess whether Jamison established prejudice. Prejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.

The 6th Circuit concluded that the suppressed evidence presented a significant challenge to the prosecution’s: theory of the case; contention that Howell and Jamison robbed the bar on the spur of the moment, and argument that Jamison kicked Mitchell to death. Consequently, the court affirmed the district court’s finding that the evidence was favorable to Jamison, that it was suppressed by the prosecution, and that prejudice resulted from the suppression of the *Brady* material. Consequently, the State of Ohio was ordered to retry Jamison within 120 days.

Lorraine v. Coyle, 291 F.3d 416 (6th Cir. 2002).

In 1986, Lorraine killed Doris and Raymond Montgomery in their home and he later confessed to the killings on videotape. To reward Lorraine for his honesty, he was charged with capital murder under the Ohio Revised Code. Lorraine was convicted of all counts and specifications and at the penalty phase of his trial, he presented ten lay witnesses, a forensic psychologist, and his unsworn statement. The State of Ohio called four rebuttal witnesses. The jury recommended the imposition of the death penalty which was adopted by the trial court.

Lorraine was unsuccessful on direct appeal and in the post-conviction process. Lorraine then filed a § 2254 petition which

was conditionally granted by the district court. The court found that Lorraine had been deprived of the effective assistance of counsel at the mitigation phase of his trial due to his counsel’s failure to investigate, develop, and present available factors relevant to mitigation. The district court faulted defense counsel for failing to develop evidence to establish that Lorraine had a mental disease or defect that significantly affected his ability to appreciate the crime. Moreover, the district court ruled that prosecutorial misconduct infected the trial. The warden perfected an appeal to the 6th Circuit.

Under the AEDPA, a federal court may not grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits unless the state court’s decision was: (1) contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

A state court’s legal decision is contrary to clearly established federal law if the court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently than the Supreme Court on a set of materially indistinguishable facts. An unreasonable application occurs when a state court identified the correct legal principle from the Supreme Court’s decisions but unreasonably applied that principle to the facts of the defendant’s case.

The warden first maintained that Lorraine procedurally defaulted his ineffective assistance of counsel claim because he failed to raise it on direct appeal. Although Ohio courts generally require defendants to raise ineffective assistance of trial counsel claims on direct appeal, courts will not require an ineffectiveness claim to be raised on direct appeal if trial counsel continues representing the defendant. In this case, one of Lorraine’s trial counsel remained on the direct appeal team. Consequently, the 6th Circuit held that Lorraine was not obligated to raise this ineffectiveness issue on direct appeal.

The Warden next maintained that the

district court misapplied the test for determining whether counsel was ineffective. After *Strickland v. Washington*, 466 U.S. 668 (1984) was decided, to show that counsel was constitutionally ineffective, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and also that counsel's deficiencies prejudiced his defense.

Initially, the district court criticized the timeliness of counsels' investigative efforts. The court faulted defense counsel for waiting five weeks before trial to file a motion for funds to hire a psychologist, a neurologist, and a pharmacologist. Moreover, counsel waited until two weeks before trial before having Lorraine evaluated for psychological and neurological damage. Finally, the district court concluded that the tests were not performed in "any timely fashion."

Consequently, in the district court's view, counsel had no time to either respond to these outcomes or plan an effective strategy. However, the 6th Circuit concluded that the record "undermined the district court's suggestion that trial counsel failed to timely investigate and develop an adequate defense."

Accordingly, the court concluded that "we simply cannot agree with the district court's conclusion that counsel were utterly and objectively ineffective during the mitigation phase of trial." Instead, the court concluded that the record "clearly reveals that trial counsel investigated and presented to the jury a comprehensive depiction of Lorraine by exploring his family history, school records, prison record, and medical history." As a result, the court ruled that trial counsels' conduct did not fall below an objective standard of reasonableness.

The 6th Circuit also criticized the district court's application of the second prong of the *Strickland* test. The district court did not find that Lorraine was prejudiced by his counsels' conduct. Instead, the court stated that "it merely had grave doubts whether counsels' alleged deficiencies could have led to mitigation."

Lorraine's trial counsel not only conducted ample investigation into his background, but developed mitigating information and presented it to the jury.

Lorraine was not prejudiced by his counsel's effort because counsel not only attempted to humanize him before the jury, they also did not deprive the jury of available mitigating evidence. Consequently, the 6th Circuit held that the district court's conclusion that Lorraine's counsel was ineffective was an unreasonable application of *Strickland*.

The 6th Circuit next considered the district court's finding that Lorraine was deprived of due process based on misconduct of the prosecutor during his trial. The district court ruled that the prosecutor's failure to disclose the identity of its rebuttal witness rose to the level of a constitutional violation rendering the mitigation phase of the trial fundamentally unfair.

As his last mitigation witness, Lorraine presented the testimony of Dr. Jackson, a forensic psychologist. On cross-examination, the prosecutor asked Dr. Jackson to produce the records that the defense had provided him so that he could provide them to a psychiatrist to review.

Defense counsel objected on the basis of Ohio R. Crim. P. 16 and claimed that the prosecutor had not provided its expert's name, despite several pretrial requests. The next day, the state called its expert as its final witness. On appeal, the Ohio Supreme Court concluded that the trial court did not err in permitting the prosecutor's expert to testify. However, the district court concluded that the trial court erred by permitting the state's expert the opportunity to testify.

The 6th Circuit rejected the district court's ruling on this issue because even assuming that the prosecutor violated Ohio R. Crim. P. 16, such a claim was not cognizable on habeas because it did not allege a constitutional violation. There is no general constitutional right to discovery in a criminal case. Instead, all the Constitution requires is that the defendant not be deprived of a fundamentally fair trial.

Moreover, to the extent that a constitutional claim can be stated under the *Brady* doctrine, the district court failed to establish that the Ohio Supreme Court's decision was an unreasonable application of *Brady* and its progeny. Due process requires the government to turn over evidence in its

possession that is both favorable to the accused and material to guilt or punishment. In this case, the information that Lorraine sought was clearly not favorable to the accused. Consequently, the 6th Circuit ruled that the Ohio Supreme Court's finding on this issue was neither contrary to nor an unreasonable application of federal law.

The district court also criticized the prosecutor's comment on Lorraine's unsworn statement to the jury. During opening statements of the penalty phase, Lorraine stated to the jury: "I would like to say that I am sorry, and I wish it never happened."

In his closing argument during the penalty phase, the prosecutor referred to the unsworn nature of Lorraine's statement and questioned why Lorraine did not comment about his mitigation. The district court concluded that as a result of the prosecutor's statements, "the jury was left with the implication that it could take into consideration the fact that Lorraine never testified and gave the jury his side of the story, except for an unsworn statement."

The 6th Circuit held that the prosecutor's statement was a fair response to Lorraine's unsworn statement. Moreover, the remark was isolated and did not result in actual prejudice. In sum, the 6th Circuit reversed the district court's grant of habeas relief and the case was remanded with specific instructions to dismiss Lorraine's habeas petition.

United States v. Crowe, 291 F.3d 884 (6th Cir. 2002).

In 1998, a confidential informant brokered the sale of heroin by Crowe to an undercover DEA agent. After the agent flashed the money to Crowe, Crowe lifted his sweatshirt to retrieve the heroin. At this point, the agent observed the butt-end of a black semi-automatic handgun protruding from under the waistband of Crowe's pants.

After the sale was complete, Crowe exited the car and he was arrested six months later at his home. At the time of his arrest, Crowe told the agents that he kept a firearm in his bedroom. A search of Crowe's bedroom revealed a black .45 caliber handgun located underneath Crowe's mattress.

Crowe was indicted for the distribution

of heroin as well as carrying a firearm during and in relation to a drug trafficking crime. Crowe pled not guilty to both counts and opted to have his case heard by the district judge at a bench trial at which Crowe declined to testify and called no witnesses. Crowe was convicted of both counts, sentenced to prison, and filed a timely appeal.

On appeal, Crowe maintained that the government offered insufficient evidence to support his conviction for carrying a firearm during and relation to a drug trafficking crime. The government sought to establish Crowe's guilt on the firearm charge through the testimony of the undercover agent who stated that he saw the butt-end of a black semi-automatic handgun protruding from Crowe's waistband during the heroin sale.

However, Crowe maintained that the agent was uncertain whether the object in Crowe's waistband was a real firearm or a fake. Consequently, Crowe urged the 6th Circuit to rule that the agent's testimony was insufficient to prove, beyond a reasonable doubt, that Crowe carried a real firearm.

The court concluded that there was sufficient evidence to support the district court's holding. The agent testified that he was "sure" that the object in Crowe's waistband was a black semi-automatic handgun.

The agent arrived at this conclusion because the butt-end of the handgun had an ammunition magazine imbedded in it, which indicated that the handgun was a semi-automatic. This feature would not be present on a toy. Moreover, the agent's testimony was corroborated by the recovery of a black semi-automatic handgun from Crowe's bedroom.

Nonetheless, Crowe made much of the fact that the agent could not state for certain whether the object in Crowe's waistband was a real handgun or a toy. The 6th Circuit held that the mere possibility that the object seen by a witness may have been a sophisticated toy or other facsimile neither creates a reasonable doubt nor is the government required to disprove that theoretical possibility.

Consequently, the court found that the agent's testimony, coupled with the recovery of the black semi-automatic handgun from

Crowe's bedroom, provided the district court with sufficient evidence for finding Crowe guilty of carrying a firearm during a drug trafficking crime beyond a reasonable doubt.

United States v. Bennett, 291 F.3d 888 (6th Cir. 2002).

Bennett was indicted by a federal grand jury on four drug related offenses. In accordance with the plea agreement, Bennett pled guilty to count three which charged him with aiding and abetting the possession with intent to distribute 341 grams of methamphetamine. In exchange for Bennett's plea of guilty, the government agreed both to drop the other three counts and to recommend that the relevant conduct was between 5 kilograms but not more than 15 kilograms of methamphetamine.

The plea agreement stated that Bennett had "been informed of the elements of the charge against him and by signing the agreement, Bennett admits that he was in fact guilty of the offense to which he was pleading guilty." Moreover, the factual basis to support Bennett's plea of guilty was not contained within the agreement.

During the plea colloquy, Bennett acknowledged that he: had received and reviewed the indictment, was familiar with the terms of the plea agreement, and was proceeding knowingly, voluntarily, and intelligently. Moreover, the district court described the elements of the crime to which Bennett was pleading guilty and Bennett acknowledged that he understood the charge against him.

However, the district court failed to ask Bennett whether he had engaged in conduct that would satisfy the elements of the crime to which he was pleading guilty. Instead, the court called upon the government to describe its case against Bennett. During the government's statement of facts to support the guilty plea, the AUSA stated that Bennett was observed driving a van belonging to a co-defendant and that Bennett was conducting counter-surveillance while the co-defendant negotiated a methamphetamine transaction with an undercover agent. Moreover, the AUSA stated that Bennett was the source of the methamphetamine and when he was arrested, Bennett admitted that he was

involved with a group of individuals in the distribution of methamphetamine.

Following this recitation, the district court asked Bennett for his plea to which Bennett responded guilty. The case was referred to the probation office for the preparation of a presentence report. The report recommended a base offense level of 36 based on a relevant conduct determination of 5 to 15 kilograms of methamphetamine. The report also recommended a four level enhancement for Bennett's role as an "organizer or leader" of criminal activity involving five or more participants.

Bennett objected to the four-level enhancement for his role in the offense as well as the relevant conduct determination. At the sentencing hearing, the government called a co-defendant who was a key source of information contained in the report. In addition to confirming the facts contained in the report, the witness stated that Bennett was "in charge at some point in time."

However, the witness also stated that Bennett "did not organize him into dealing drugs" because he was already doing so through other suppliers when he met Bennett. Finally, the witness stated that "he worked for himself" and that Bennett "fronted" him the methamphetamine that he sold to his customers without direction from Bennett.

The district court found that Bennett was an organizer or leader in drug trafficking activity and it applied the four-level enhancement. However, Bennett did not reiterate his objection to the relevant conduct determination at the sentencing hearing. Instead, the district court implicitly adopted the recommended offense level of 36 without making any factual findings or any comments regarding the amount of methamphetamine for which Bennett should be held responsible. The court then proceeded to impose sentence and Bennett filed a timely appeal.

The first issue raised on appeal was whether the district court erred in finding Bennett guilty of count three of the indictment. Bennett maintained that the district court erred in accepting his guilty plea because it lacked a basis in fact as required by Fed. R. Crim. P. 11(f).

The 6th Circuit found that Rule 11(f)

does not concern the acceptance of a guilty plea. Instead, the rule provides that “notwithstanding the acceptance of a plea, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.” Consequently, the 6th Circuit ruled that a sufficient factual basis for Bennett’s plea must have been present at the time of his sentencing, when judgment was entered, and not at his guilty plea hearing.

Bennett pled guilty to aiding and abetting the possession with intent to distribute a controlled substance. The elements of § 841 are that: (1) the defendant knowingly; (2) possessed a controlled substance; and (3) with the intent to distribute. To prove aiding and abetting, the government must show that the defendant knew that the principals possessed the controlled substance with the intent to distribute it and that the defendant assisted in the plan to distribute the drugs.

Consequently, Bennett’s mental state was an essential element of the offense to which he pled guilty. Moreover, it was this element that Bennett claimed was unsupported by facts because the district court neglected to ask Bennett whether he had the requisite knowledge and intent.

Normally, the only direct evidence of a defendant’s mental state would be the defendant’s own statement as to what he was thinking. However, in this case, the district court did not ask Bennett about his knowledge and intent. The 6th Circuit ruled that the district court’s failure to do so was not fatal to the effectiveness of Bennett’s plea. Instead, Bennett’s mental state could be supported by circumstantial evidence establishing his knowledge and intent.

A bare statement from the prosecutor that he would have proven that the defendant acted with the requisite intent is not sufficient to support a guilty plea under Rule 11(f). In this case, the only facts before the court to support Bennett’s plea were those contained in the plea agreement and the government’s offer of proof.

The 6th Circuit found that even assuming, for the sake of argument, that Bennett’s knowledge and intent were not

supported by the government’s offer of proof at the guilty plea hearing, a sufficient factual basis to support his plea clearly existed by the time of the sentencing hearing. The factual record at Bennett’s guilty plea hearing was supplemented at the sentencing hearing by the presentence report as well as the testimony of a co-conspirator.

From these and other facts, the district court could easily have inferred that Bennett had the required mental state. Consequently, despite the fact that the district court’s plea colloquy was inadequate, the 6th Circuit concluded that the court did not abuse its discretion in entering judgment against Bennett.

The second question was whether the district court erred by enhancing Bennett’s sentence based on its conclusion that he was an “organizer or leader” of criminal activity. A participant is defined in USSG § 3B1.1 as one who “is criminally responsible for the commission of the offense, but need not have been convicted.” The 6th Circuit found that Bennett was engaged in criminal activity that involved at least five other participants.

To qualify for a leadership enhancement under § 3B1.1, the defendant must have been an organizer, leader, manager, or supervisor of one or more participants. Therefore, Bennett need not have been an organizer or leader of all four of the other participants, but only one of them. The court reviewed the record and found that the evidence showed that Bennett’s organizational initiative and management power were such that it was not clearly erroneous for the district court to have determined that he was an organizer or leader of criminal activity of one or more participants. Accordingly, the 6th Circuit affirmed the four-level enhancement pursuant to § 3B1.1(a).

Finally, Bennett maintained that the district court erred in not complying with Fed. R. Crim. P. 32(c)(1) when it failed to make specific factual findings regarding the amount of methamphetamine for which Bennett was responsible. Rule 32(c)(1) “prohibits a court faced with a dispute over sentencing factors from adopting the factual findings of the presentence report without making an actual determination of its own.”

The primary purpose for the rule is to ensure that the sentence is based on reliable facts found by the court after deliberation, not on the delegation of the fact finding process to the probation officer or the prosecution. The court ruled that Bennett's written objection to the presentence report's recommended offense level of 36 constituted an objection to the presentence report's factual determination of the amount of methamphetamine attributed to him.

Despite Bennett's written objection, the district court said nothing about the amount of methamphetamine attributable to Bennett. However, the 6th Circuit ruled that the district court did not run afoul of Rule 32(c)(1) because Bennett waived his written objection at the sentencing hearing. By failing to reiterate his objection to the base offense level when asked by the district court whether there was "anything else" that needed to be considered, Bennett waived his right to object to the amount of methamphetamine.

At this point in the sentencing hearing, the amount of methamphetamine attributable to Bennett ceased to be a "controverted" sentencing matter under Rule 32(c)(1). Therefore, the district court was entitled to adopt the recommendation of the presentence report regarding the amount of methamphetamine attributable to Bennett without making its own factual findings.

United States v. Osborne, 291 F.3d 908 (6th Cir. 2002).

In 1997, Tennessee State Police began investigating a methamphetamine distribution ring with which both James Pete Osborne and James Carl Osborne were affiliated. James Pete Osborne is the father of James Carl Osborne and they were indicted with seven other co-defendants in a 16 count indictment.

The Osbornes went to trial and were convicted based on the testimony of one agent, two informants, and several of their co-defendants. At sentencing, James Pete Osborne argued that the sentencing range recommended by the probation office violated the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). After rejecting Osborne's *Apprendi* argument, James Pete Osborne was

sentenced to serve 262 months in prison.

James Carl Osborne filed numerous objections to his presentence report. James Carl Osborne's central challenge was to the quantity of methamphetamine for which he was held accountable. At the conclusion of the arguments advanced by both counsel, the district judge announced: "I think the guideline range is correct," and sentenced James Carl Osborne to 41 months in prison.

On appeal, both Osbornes raised various challenges to the sentences imposed by the district court. However, the 6th Circuit failed to reach the merits of the arguments raised by the Osbornes. Instead, the court decided this case based on procedural errors made by the district court.

James Pete Osborne maintained that his case should be remanded for resentencing because the district court failed to ascertain whether he and his counsel read and discussed the presentence report prior to sentencing. The 6th Circuit found that Fed. R. Crim. P. 32(c)(3)(A) requires a district court, before imposing sentence, to verify that the defendant and his counsel read and discussed the presentence report.

However, a district court does not need to expressly ask the defendant if he and his counsel read and discussed the report; instead, the court needs only to determine that the defendant and counsel have had an opportunity to read and discuss the presentence report. The fact that the defendant and his counsel may have discussed issues contained in the report is insufficient -- there must be evidence, on the record, that the defendant and his counsel have read and discussed the report.

When a district court does not comply with Rule 32(c)(3)(A), the defendant's sentence must be vacated and the case must be remanded for re-sentencing. The 6th Circuit found that the transcript of the sentencing hearing failed to reveal any statement that could be read to provide verification that Osborne and his attorney read and discussed the presentence report.

Obviously, Osborne and his attorney were aware of at least one issue that arose in the report as evidenced by their *Apprendi* argument. However, this argument did not

require any discussion of the contents of the presentence report, and no other issues were discussed at the sentencing hearing. Accordingly, the 6th Circuit vacated James Pete Osborne's sentence and remanded his case for re-sentencing.

James Carl Osborne argued that the district court failed to comply with Fed. R. Crim. P. 32(c)(1) by failing to make findings with respect to objections that Osborne raised to the presentence report. Rule 32(c)(1) requires the district court, at sentencing, to rule on any objections that the defendant has made to the presentence report.

Moreover, "for each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."

The 6th Circuit has interpreted the district court's obligation literally, explaining that "strict compliance with Rule 32(c)(1) helps to ensure that defendants are sentenced on the basis of accurate information and provides a clear record for appellate courts, prison officials, and administrative agencies who may later be involved in the case." Therefore, a judge's summary acceptance of the presentence report is not enough to dispose of a defendant's challenges to a presentence report and comply with Rule 32.

In this case, the presentence report held James Carl Osborne responsible for distributing 24 grams of methamphetamine. Osborne challenged this finding before the district court. However, the judge rejected Osborne's argument and sentenced him in accordance with the report. The district court merely stated that "I think the guideline range is right. . ."

The district judge did nothing more than state summarily, that he was accepting a sentencing range as set forth in the report. James Carl Osborne's sentence was vacated and his case was remanded to the district court for resentencing after the 6th Circuit found that the district court's findings were insufficient to comply with Rule 32(c)(1).

Vincent v. Jones, — F.3d —, 2002 WL 1205432 (6th Cir. 2002).

Vincent and two co-defendants were

charged with murder and possession of a firearm during the commission of a felony, both in violation of Michigan law. These charges arose from a shooting that occurred during a confrontation between two groups of youths at a high school in Flint, Michigan.

At the close of the prosecution's case-in-chief, counsel for all three defendants moved for directed verdicts of acquittal on the first degree murder charges. The basis for the motions was that there was insufficient evidence of premeditation and deliberation.

After the parties presented their arguments, the trial judge announced that there was no proof of premeditation or planning in the slaying and that, at the very best, what the prosecution proved was second degree murder. After the judge made various findings, he stated that "I think that the second count should remain as it is, felony firearm. And I think that second degree murder is an appropriate charge as to the defendants." This ruling was not communicated to the jury.

Prior to adjourning for the day, the prosecution requested permission to make additional arguments regarding the first degree murder charge the following morning and the trial judge agreed to hear this argument. The next day, the prosecutor argued against directing a verdict on the first degree murder charge.

Defense counsel objected to this argument because the trial court had granted the motion for directed verdict the day before and jeopardy had attached. The trial court engaged defense counsel in a colloquy in which the court acknowledged that it granted the motion for judgment of acquittal but that he had not directed a verdict in writing. Consequently, the trial judge was of the opinion that the Double Jeopardy Clause did not forbid him from reconsidering his prior ruling.

The trial judge proceeded to take testimony from other witnesses and then the following day, he stated that: "I've reconsidered the ruling that the court earlier made and I've decided to let the jury make its own determination on the degrees. That's where we stand now so we'll let them have all those issues submitted to them, first, second, manslaughter and you can go from there."

The jury convicted Vincent of first degree murder and he appealed. One of the issues raised on appeal was whether the trial court's reconsideration of its ruling to grant a judgment of acquittal violated the Double Jeopardy Clause. The Michigan Court of Appeals ruled that the trial judge had ordered a directed verdict and could not reverse a grant of a directed verdict later in the trial. Consequently, Michigan Court of Appeals reversed Vincent's first degree murder conviction and ordered the entry of a conviction for second degree murder.

The Michigan Supreme Court reversed after finding that the trial judge should not have ordered a directed verdict. Vincent then filed a § 2254 petition in which he argued that the "Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy" was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

The district court held that the trial judge's statements were sufficient to rise to the level of an acquittal on the first degree murder charge such that the continuation of the trial constituted a violation of the Double Jeopardy Clause. Consequently, the district court granted Vincent's § 2254 petition and the Warden appealed.

Under § 2254(d), a writ may issue if the state court applied a legal rule that contradicted United States Supreme Court precedent or if the state court applied the correct legal rule but its application of the rule to the facts was objectively unreasonable.

The Warden maintained that the district court's decision that the trial judge violated the Double Jeopardy Clause was erroneous for two reasons. First, the Warden argued that the Michigan Supreme Court's determination that the trial judge's statements did not constitute a directed verdict was entitled to deference. Secondly, the Warden maintained that the state trial judge could reconsider his grant of the directed verdict motion shortly thereafter without violating the Double Jeopardy Clause.

The 6th Circuit ruled that once a defendant has been acquitted of a crime, the

Double Jeopardy Clause prohibits any further prosecution of the defendant for that crime. Whether the trial is to a jury or to the bench, subjecting the defendant to post-acquittal fact-finding proceedings of guilt and innocence violates the Double Jeopardy Clause.

The 6th Circuit reviewed the statements of the trial judge and focused on the legal significance of these statements. The court summarized the events by finding that the trial judge initially granted the motion for directed verdict at the end of the government's case-in-chief. Moreover, the judge then allowed the government to reargue the issue the next morning and took the matter under advisement. Finally, two days after granting the motion, the trial judge reversed his decision.

When the trial judge granted the motion for directed verdict, his actions constituted a grant of an acquittal on the first degree murder charge such that jeopardy attached. The judge was not entitled to reverse that decision later in the trial. It was irrelevant whether the trial judge had informed the jury of his decision. In sum, by submitting the case to the jury on the first degree murder charge, the trial judge violated the Double Jeopardy Clause. Accordingly, the 6th Circuit affirmed the district court's decision granting Vincent habeas relief.

United States v. Sykes, — F.3d —, 2002 WL 1205385 (6th Cir. 2002).

Sykes and three accomplices robbed a bank in Nashville in 1997. During the robbery, Sykes brandished an assault weapon. Although Sykes did not fire the weapon, he pointed the weapon at bank customers and robbed them while his accomplices robbed the bank. A surveillance camera photographed Sykes brandishing the weapon.

From the surveillance photographs, it was impossible to determine whether the gun had fully automatic fire capability or semi-automatic single shot capability. Nonetheless, the robbers made off with \$28,000 and traveled to Sykes' house in his Cadillac.

After Sykes and his co-defendants were arrested, he interfered with the investigation. Sykes attempted to pass a note to a relative in which he provided a script for the relative to follow when he was

interviewed by the FBI. Moreover, when Sykes was interviewed by the FBI, he denied any involvement with the robbery and claimed that his car was in the repair shop that day. Sykes had his girlfriend obtain a false car repair invoice for his Cadillac to corroborate his story that the car was in the shop on the day of the robbery.

Sykes eventually had an epiphany after which he changed his story and pled guilty to the robbery and firearm charges. The plea agreement entered into by Sykes and the government had a waiver of appeal provision as to the robbery charge. However, this appeal waiver did not apply to weapons offense. Instead, the plea agreement provided that “the parties agree that the sentencing judge shall make the determination of what category of firearms was used and carried in the bank robbery by a preponderance of the evidence standard.”

The weapon used by Sykes was never recovered. However, Sykes’ brother informed the FBI that the weapon was a fully automatic assault rifle. Moreover, a co-defendant told the agents that the weapon was fully automatic. At the sentencing hearing, Sykes’ expert claimed that there was no way to determine, from examining the pictures of the robbery, whether the weapon was capable of fully automatic fire. The expert also claimed that he was unable to rule out the possibility that the weapon was a replica.

At the sentencing hearing, Sykes entered an unsworn written statement in which he stated that he never fired the weapon and did not know whether it was capable of fully automatic fire. Moreover, Sykes stated that he did not know whether the weapon was a replica. The district court found, by a preponderance of the evidence, that the weapon was a semi-automatic rifle and imposed a mandatory ten year consecutive sentence on the weapons offense.

The plea agreement noted that the government would seek a three level enhancement for Sykes’ aggravated role in the offense as well as a two level enhancement for Sykes’ obstruction of justice. However, Sykes was free to oppose the application of these enhancements but he expressly waived his right to appeal those determinations made by

the district court.

Predictably, the district court imposed the enhancements for Sykes’ leadership role as well as his obstruction of justice. However, despite the appeal waiver, Sykes appealed his sentence and conviction for the weapon offense as well as the application of the base offense level enhancements.

Title 18 U.S.C. § 924(c)(1) requires a mandatory consecutive sentence for anyone who uses or carries a firearm during a crime of violence. Moreover, the statute prescribes different mandatory consecutive sentences based on the type of firearms involved. Prior to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), § 924(c) determinations were made by a judge on a preponderance of the evidence standard.

The 6th Circuit ruled that Sykes was correct that, absent a waiver, the § 924 charge should have been heard by a jury and proven beyond a reasonable doubt. However, the court also found that a defendant could waive these requirements after executing a waiver.

Sykes maintained that his waiver was not knowing or voluntarily made. However, the 6th Circuit found that Sykes clearly waived both the right to have a jury consider the weapons offense as well as his right to have that determination made by a reasonable doubt standard. Consequently, the court ruled that the district court’s determinations were not clearly erroneous.

Sykes next posited that there was insufficient evidence upon which the district court could determine that the weapon was capable of semi-automatic fire. Title 18 U.S.C. § 924(c)(1) provides a mandatory consecutive sentence of: 30 years if a weapon was a machine gun; ten years for semi-automatic assault weapons; and five years for any other firearm.

The district court held that the weapon brandished by Sykes during the robbery was at least capable of semi-automatic fire and the 6th Circuit found that this conclusion was easily supported by the evidence. Sykes’ co-defendants described the weapon as fully automatic. Sykes’ brother testified that Sykes told him that the weapon was a machine gun. Moreover, the FBI agent assigned this case testified that Sykes told him during a proffer

that the gun had “AR-15” engraved on the side.

Nonetheless, Sykes argued that the court could not rule out the possibility that the weapon was a replica and that it was impossible to determine whether the weapon was capable of fully automatic fire.

The 6th Circuit held that the government was only required to show that the weapon was more likely than not capable of semi-automatic fire. Based on the execution of the bank robbery, the court found that Sykes’ argument that the weapon could have been a non-firing replica defied belief and was not the most likely scenario. In conclusion, the 6th Circuit ruled that the district court’s decision that the weapon was a semi-automatic weapon was extraordinarily generous in light of the evidence that was adduced at the sentencing hearing.

Finally, Sykes maintained that the district court inappropriately increased his offense level for his leadership role as well as his obstruction of justice. The 6th Circuit ruled that Sykes’ arguments were foreclosed because of his clear waiver of his right to appeal the district court’s sentencing determinations. After examining Sykes’ waiver, the court held that there was no reason that Sykes’ waiver of his right to appeal these sentencing determinations should not be respected.

Fitzgerald v. Withrow, — F.3d —, 2002 WL 1205299 (6th Cir. 2002).

Fitzgerald and Colvin were charged with the 1991 kidnapping of Leroy Huckleberry. The State of Michigan alleged that Fitzgerald and Colvin abducted Huckleberry in Detroit, placed him in the back of a van, bound his hands and legs, and covered his head. Huckleberry’s captors then contacted his family and threatened to kill him if a ransom was not paid. After the family refused to pay, Huckleberry was released. Huckleberry testified that he never saw the faces of his captors. Although Huckleberry could not identify the faces of his captors, he was able to identify the voices of Fitzgerald and Colvin as those of his captors.

After a trial judge was assigned for the joint trial of Fitzgerald and Colvin, Fitzgerald waived his right to a jury trial. The trial judge, Judge Baxter, conducted an extensive

colloquy with Fitzgerald, explaining, among other things, that she would be determining his guilt or innocence, that she had heard evidence in pretrial proceedings that would be inadmissible for the trier of fact, and that she would attempt to ignore that evidence.

Colvin did not waive his right to a jury trial and proceeded to trial. During the trial, Judge Baxter fell ill and Judge Townsend assumed responsibility for Colvin’s jury trial as well as Fitzgerald’s bench trial.

Upon hearing of this assignment, Fitzgerald requested a jury trial. However, Judge Townsend noted that Fitzgerald had already waived his right to a jury trial and held that he would determine Fitzgerald’s guilt at a bench trial.

After the bench trial concluded, Judge Townsend found Fitzgerald guilty of kidnapping. Fitzgerald appealed to the Michigan Court of Appeals claiming that he had only partially waived his right to a jury trial and to that extent, he consented to a bench trial before Judge Baxter. The Michigan Court of Appeals affirmed Fitzgerald’s conviction and the Michigan Supreme Court denied Fitzgerald leave to appeal.

Fitzgerald then filed a § 2254 petition contesting his conviction and sentence on numerous grounds. The district court granted Fitzgerald habeas relief on his 6th Amendment claim after finding that the bench trial before Judge Townsend violated his 6th Amendment right to a trial by jury.

The State of Michigan appealed to the 6th Circuit which held that because Fitzgerald filed his habeas petition prior to the enactment of the AEDPA, it would review *de novo* the Michigan court’s determinations of law and overturn the factual findings only if they were contradicted by “clear and convincing evidence.”

The sole question for review was whether Fitzgerald waived his 6th Amendment right to a jury trial to the extent that permitted the bench trial conducted by Judge Townsend. The 6th Circuit found that Fitzgerald did not have a constitutional right to demand a bench trial with a particular judge.

Instead, the 6th Amendment merely entitles defendants to a jury trial. A defendant

may waive his right to a jury trial and if the state also consents, have a bench trial under Michigan law. However, a defendant is not entitled to make a limited or conditional waiver of his right to a jury trial. In order for the waiver to be valid, a defendant's waiver must be "knowing, voluntary, and intelligent." In the absence of a valid waiver, a defendant will be tried by a jury.

Fitzgerald signed a written waiver of his right to a jury trial which provided: "I, having had the opportunity to consult with counsel, do hereby in open court voluntarily waive and relinquish my right to a trial by jury and **elect to be tried by a judge of the above-named court**, in which this cause is pending."

The 6th Circuit ruled that this precise written waiver was sufficient to permit a bench trial by any judge on the court, not just by the judge who took the waiver. In this case, Judge Baxter had engaged in an extensive colloquy with Fitzgerald to determine whether his waiver was knowing, intelligent, and voluntary. The combination of the colloquy conducted by Judge Baxter and the written waiver that Fitzgerald signed indicated to the 6th Circuit that Fitzgerald consented to be tried by "a judge of the court."

Because the 6th Circuit found that Fitzgerald's waiver was valid for a bench trial, it reversed the district court's order granting Fitzgerald's § 2254 petition and his petition was dismissed.

United States v. Hover, — F.3d —, 2002 WL 1284288 (6th Cir. 2002).

Felipe Wated was in the business of importing counterfeit currency into the United States from Columbia. In order to accomplish this task, Wated enlisted the assistance of three people, including Hover. Wated testified that he contacted Hover and asked if he was interested in assisting him in the importation of counterfeit currency into the United States. Hover expressed an interest and he met co-defendant Scott Barnes in Detroit to pick up \$10,000 in counterfeit bills.

Following this meeting, Wated arranged another pickup for Hover of an additional \$50,000 through Barnes. After unloading the cash, Hover would make cash deposits of genuine currency into a joint checking account controlled by Barnes and

Wated. Moreover, on at least two occasions, Wated and Hover wired payments directly to Columbia.

In April 1999, Wated arranged for Barnes to receive a shipment of \$60,000 from Columbia. Of that money, \$10,000 was to be distributed to Samuel Terfa while the remainder was to be distributed to Hover. Unbeknownst to Wated, a U.S. Customs agent in Memphis intercepted the package containing the counterfeit currency.

Agents arranged a controlled delivery of the package to the Barnes' residence, which then lead to his arrest. Barnes cooperated and contacted Hover to arrange his pickup of the counterfeit money. When Hover arrived and attempted to take possession of the counterfeit currency, he was arrested. A similar fate awaited Terfa.

Terfa and Hover went to trial, at which Hover testified. This trial ended in a mistrial due to the ineffective assistance of counsel rendered by Hover's attorney. At the second trial, Hover did not testify but both defendants were convicted of all counts.

A presentence report was prepared by the probation office in which the officer recommended the following two level enhancements to Hover's base offense level: (1) obstruction of justice based on Hover's perjury at his first trial; and (2) because part of the crime was committed outside of the United States, an enhancement pursuant to USSG § 2B5.1.

The district court applied these enhancements and imposed a 36 month sentence and Hover appealed. On appeal, the 6th Circuit first considered whether the district court properly increased Hover's offense level because at least part of the offense was committed outside of the United States.

Hover maintained that the evidence was insufficient to establish that he had knowledge of the origin of the counterfeit currency. USSG § 2B5.1(b)(5) states: "If any part of the offense was committed outside the United States, increase the offense level by two levels." The 6th Circuit found that the plain language of this guideline provision does not require the government to prove that a defendant had express knowledge of any acts occurring outside the United States.

Instead, § 2B5.2(b)(5) provides an enhancement based solely on the fact that “any part” of the crime occurred outside of the United States. Consequently, the 6th Circuit refused to read a knowledge requirement into this guideline provision. In the alternative, the court ruled that even if § 2B5.2(b)(5) had a knowledge requirement, Hover certainly possessed the requisite level of knowledge.

Finally, Hover maintained that the district court erroneously increased his offense level based on his perjury at his first trial. In making this argument, Hover did not maintain that he did not perjure himself at the first trial. Instead, Hover merely maintained that his perjury should not be considered in his sentencing because the first trial ended in a mistrial.

USSG § 3C1.1 provides that if “(A) the defendant wilfully obstructed or impeded or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction . . . increase the offense level by two levels.”

Thus, the framed issue was whether a defendant’s first and second trials are part of the same “prosecution” for purposes of USSG § 3C1.1? The 6th Circuit concluded that because Hover was retried on the very same charges, the district court could properly consider the perjury committed by Hover at his first trial in determining whether to enhance his offense level for obstruction of justice. Consequently, the 6th Circuit affirmed the application of the sentencing enhancements to Hover’s case.

United States v. Harris, — F.3d —, 2002 WL 1284297 (6th Cir. 2002).

In 1996, police officers in Maysville, Kentucky received information that Harris was involved in drug trafficking at the Best Western Motel. A background check was performed on Harris at which time it was discovered that his driving privileges had been suspended indefinitely. Moreover, the officers obtained a description of Harris’ vehicle and his Ohio temporary license plate number.

Surveillance was set up at Harris’ hotel room at which time he was observed arriving with another reputed cocaine dealer, Washington. These two individuals entered

Harris’s room and soon thereafter, two other individuals, Delaney and Baker, arrived at the motel and entered Harris’s room.

After a few minutes, Delaney left the room, retrieved a black plastic box from the trunk of his car, and returned to Harris’s room. Later, Baker and Delaney left Harris’s room with the box. Officers stopped Delaney’s car because it had expired license plates. Once the car was stopped, the officers smelled a strong odor of marijuana emanating from the car. After finding the marijuana, Baker and Delaney were arrested for possession of marijuana.

After searching the car pursuant to the arrest of its occupants, the officers found crack as well as a .38 caliber revolver in the black plastic box. The officers then received word that Harris and Washington were leaving the motel. As Harris passed the location of the stop of Delaney’s car, Harris was arrested for operating a motor vehicle with a suspended driver’s license.

Although Harris did not have cocaine in his possession, he was in possession of a large amount of cash. As Washington exited the car, she dropped a quantity of crack on the seat and she later stated that she received the cocaine from Harris while riding in his car.

Harris opted for a jury trial at which Delaney, Baker, and Washington all testified against him. The three witnesses testified that on the evening of their arrest, Harris agreed to sell both Baker and Washington one ounce of crack. Moreover, Baker stated that Harris had been his crack supplier for more than one month.

The three witnesses stated that Delaney and Baker purchased crack from Harris in the hotel room and that Delaney brought Harris’s gun to the room. After Harris showed the three individuals his gun, Delaney stated that he took the gun back to his car.

At trial, Delaney testified that Harris said that the gun was not his. However, before the grand jury, Delaney testified that Harris wanted Delaney to keep the gun for him. Neither Baker nor Washington could recall whether Harris held the gun after Delaney brought it to the room.

The jury convicted Harris of

distribution of crack as well as possession of a firearm by a convicted felon. After the district court considered Harris's prior conviction as a sentencing enhancement, it sentenced him to serve 30 years in prison on the distribution count and a 10 year concurrent sentence on the firearm count. Harris then appealed to the 6th Circuit.

On appeal, Harris maintained that the district court's failure to submit the drug quantity determination to the jury violated the Supreme Court's mandate announced in *United States v. Apprendi*, 530 U.S. 466 (2000). Although the indictment charged a drug amount (37 grams of crack), the question of the amount of drugs was not presented to the trial jury. This error was indisputably in contravention of the mandate of *Apprendi*. However, the 6th Circuit ruled that because Harris did not raise his *Apprendi* claim in the district court, his claim could only be reviewed for plain error.

The 6th Circuit applied *United States v. Cotton*, 122 S. Ct. 1781 (2002) and ruled that when a defendant fails to raise an *Apprendi* objection, enhancement of the sentence by the trial judge based on the amount of drugs does not constitute plain error because the error does not seriously affect the fairness of the proceeding if the drug amount was clearly proven. In this case, the court found that the evidence was overwhelming that Harris possessed the minimum drug quantity to justify the sentence imposed.

Next, Harris challenged the sufficiency of the evidence of both counts of the indictment for which he was convicted. In order to convict Harris of the distribution count, the government must prove that he: (1) knowingly or intentionally distributed crack; (2) on or about the date and time in question, and (3) knew at the time of the distribution that the substance was crack.

The 6th Circuit parsed the record and concluded that there was sufficient evidence from which a rational trier of fact could have found that Harris knowingly and intentionally distribute crack. As a result, this conviction was affirmed.

To prove Harris guilty of being a felon in possession of a firearm, the government must prove that: (1) he had a prior felony

conviction; and (2) on or about the time in question, he possessed a firearm. The court again reviewed the record and ruled that the district court did not err in holding that Harris had a prior felony conviction. Moreover, there was clear evidence that, at a minimum, Harris exercised constructive possession over the gun by ordering Delaney to bring it to the hotel room. Consequently, the 6th Circuit held that there was also sufficient evidence to sustain Harris's felon in possession of a firearm conviction.

United States v. Walls, — F.3d —, 2002 WL 1284248 (6th Cir. 2002).

Franklin Walls and Jackie Phillip Stephens were indicted on numerous counts involving their involvement in a conspiracy to manufacture and distribute methamphetamine. Moreover, Stephens was charged with carrying a firearm during and in relation to a drug trafficking crime.

The evidence adduced at trial established that Stephens regularly cooked methamphetamine during the period relevant to the charged conspiracy. The government's first witness was a regular methamphetamine user who testified that she got methamphetamine from Stephens between 10 and 20 times. Moreover, Stephens cooked the methamphetamine at her house twice.

Another witness, who was 18, testified that she had used methamphetamine every day for about two years and was using it at the time of the trial. Moreover, this witness testified that she lived with Stephens for a year and he provided her with methamphetamine.

At some point in the investigation, Stephens was observed driving a Lincoln Continental in excess of the speed limit and the officer that observed him knew that Stephens' driver's license was suspended. When the officer attempted to stop Stephens, a high speed chase ensued and Stephens eluded the officer. Stephens' car was later found with the door open and the motor running after he had hit a tree and abandoned the car. Moreover, a loaded .9 mm pistol was found between the front seats. Also in the car were instruments that would be commonly used to manufacture methamphetamine.

Sometime later, Walls was stopped at

a residence that was under surveillance. Walls was found to have a plastic bag in his pocket that contained a used coffee filter that contained methamphetamine residue. Moreover, a search of Walls' vehicle also led to the discovery of material that was commonly used to manufacture methamphetamine. Both Walls and Stephens were tried together, convicted of all charges, and sentenced to lengthy jail terms.

On appeal, Walls maintained that the district court erred by failing to grant his motion for severance. Walls argued that the likelihood of prejudicial spillover of evidence concerning Stephens' shenanigans mandated severance under Fed. R. Crim. P. 14. Walls was only charged in five of the twelve counts and an overwhelming proportion of the testimony involved criminal conduct not directly related to him.

Walls also complained that the evidence offered against Stephens was prejudicial because it included evidence of: high speed car chases with the police; possession of a loaded gun during one of those chases; and association with young women to whom Stephens provided methamphetamine.

However, the 6th Circuit ruled that severance is required only if there is a serious risk that a joint trial would either compromise a specific right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.

Nonetheless, the 6th Circuit rejected Walls' severance argument after finding that he failed to show specific and compelling prejudice that would mislead or confuse the jury in the absence of a separate trial. Even when a defendant is able to show some potential for jury confusion, this confusion must be balanced against society's interest in speedy and efficient trials.

Walls next challenged the sufficiency of the evidence to support his conviction for conspiracy to manufacture methamphetamine. Walls maintained that the evidence established multiple conspiracies and not the conspiracy charged in the indictment. If an indictment alleges one conspiracy but the evidence can be construed as supporting a finding of multiple conspiracies, a variance results.

However, a single conspiracy is not converted into multiple conspiracies simply because: it can be subdivided, there are changes in the individuals involved, or there are changes in the roles that conspirators play in the conspiracy. Moreover, a variance in the proofs does not require reversal unless it prejudiced a defendant's substantial rights.

To sustain a conviction under 21 U.S.C. § 846, the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy. A tacit or material understanding among the parties to a conspiracy is sufficient to establish the agreement. Moreover, a conspiracy may be inferred from circumstantial evidence that may reasonably be interpreted as participation in a common plan.

The court found that there was ample evidence offered to establish at least a tacit understanding among the co-conspirators to cooperate with each other in the manufacture, use and sale of methamphetamine during the relevant time period. Consequently, the 6th Circuit found that a variance did not occur and it affirmed Wall's conspiracy conviction.

Stephens challenged the sufficiency of the evidence to support his conviction for carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). Stephens conceded that he "carried" the firearm by having it with him in the car when he crashed his car into a tree.

However, Stephen maintained that he did not carry the firearm "during and in relation to" a drug trafficking crime. Mere possession of a firearm during the course of criminal activity will not support a conviction under § 924(c). Instead, in order to establish the connection, the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. The weapon must at least facilitate or have the potential of facilitating the drug trafficking offense.

To make this determination, the court looked not just at the Stephens' specific intentions at the time, but also at the totality of the circumstances surrounding the

commission of the crime: “the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime.”

Stephens argued that when he engaged in his conduct to elude the officers, he was not acting in furtherance of the conspiracy. Instead, Stephens maintained that he was carrying all of his worldly belongings in the car with him that day. According to Stephens, the presence of the handgun simultaneously with materials used to manufacture methamphetamine was merely coincidental.

However, the 6th Circuit found that the government offered evidence that individuals engaged in making and selling methamphetamine often use firearms to protect themselves. Moreover, on the day in question, Stephens was engaged in drug trafficking offenses and had a loaded firearm next to him in the car during his flight from police. Consequently, the evidence, when viewed in the light most favorable to the prosecution, was sufficient to lead a rational trier of fact to conclude that the firearm was being carried during and in relation to a drug trafficking crime.

Finally, Stephens argued that the addition of the § 924(c) offense in the superseding indictment was the result of a vindictive prosecution. The original indictment did not contain a firearm offense. However, a superseding indictment returned after one of Stephens’ co-defendant’s agreed to cooperate. Consequently, new defendants were added and the firearm charge was also added against Stephens.

Stephens maintained that the firearm charge was added as a vindictive decision to punish his assertion of his right to trial and his refusal to plead guilty. However, to establish vindictive prosecution, a defendant must prove that the prosecutor had some “stake” in determining the exercise of his right to trial and that the prosecutor’s conduct was unreasonable.

The 6th Circuit ruled that when the pretrial addition of more serious charges results merely from the failure of the plea bargaining process, it is not a vindictive prosecution. Consequently, the court held that

Stephens could not demonstrate “a realistic likelihood of vindictiveness.” Because of this failure of proof, the government was not required to disprove vindictiveness or to justify the challenged action.

United States v. Clark, — F.3d —, 2002 WL 1339144 (6th Cir. 2002).

In 1998, a robber entered the First America Bank in Nashville and handed a teller a note that read “I have a gun. Do what you are told and you won’t get hurt.” No weapon was displayed during the robbery and the robber took the money and left the bank.

Later, the teller identified Clark as the robber. When Clark was interviewed by law enforcement, he confessed to robbing the bank. After obtaining this confession, Officer Roll left the interview area. During Roll’s absence, Clark told Officer Everett that voices told him to rob the bank. While making this claim, Clark was calm, cooperative, and talkative.

At a court proceeding scheduled one week later, Officer Everett noted a marked difference in Clark’s behavior. At this hearing, Clark appeared “edgy and uneasy.” Moreover, Officer Everett described Clark’s demeanor as “like a coiled spring.” At this hearing, Clark’s counsel questioned whether Clark was receiving his medication as he had a known history of mental illness.

After Clark was indicted for bank robbery, a defense psychiatrist interviewed him. Prior to the interview, the psychiatrist reviewed Clark’s medical records and the facts surrounding the robbery. The psychiatrist was familiar with Clark as he had interviewed him seven years before in connection with another matter.

Based on these facts, the defense psychiatrist concluded that at the time of the robbery, Clark was impaired in his ability to fully understand what he was doing and substantially impaired in his ability to understand the consequences. Clark was also diagnosed as a “chronic paranoid schizophrenic with limited intelligence.”

Although the psychiatrist was not able to conclude with certainty, he believed that it was more likely than not that Clark was responding to auditory hallucinations that told him to rob the bank. After this diagnosis,

Clark was sent to the United States Medical Center at Springfield, Missouri for further evaluation.

While at Springfield, Clark was interviewed six times by a forensic psychologist who eventually found that Clark was fit to stand trial. This forensic psychologist also found that although Clark was suffering from chronic paranoid schizophrenia, he knew what he was doing when he robbed the bank and he understood that what he was doing was wrong.

The case proceeded to trial at which Clark offered an insanity defense. The jury heard evidence concerning the robbery as well as the psychiatric experts' conflicting testimony concerning Clark's sanity at the time of the crime. Defense counsel did not move for judgment of acquittal at the close of the evidence and the jury returned a guilty verdict.

At sentencing, the district court found that Clark made a "threat of death" during the commission of the robbery thereby warranting a two level sentencing enhancement under USSG § 2B3.1(b)(2)(F). After sentence was imposed, Clark prosecuted this timely appeal.

The first issue litigated on appeal was the sufficiency of the evidence to sustain Clark's conviction. The 6th Circuit found that Clark's failure to move for a judgment of acquittal constituted a waiver of his right to challenge the sufficiency of the evidence on appeal. Consequently, the court's review was limited to determining "whether there was a manifest miscarriage of justice which exists only if the record is devoid of evidence pointing to guilt."

It is without question that the government has the burden of proving every element of the offense charged beyond a reasonable doubt. However, because Clark presented a defense of diminished responsibility, he bore the burden of proving insanity by clear and convincing evidence.

There are two different types of mental disease or defect defenses: (1) diminished responsibility where the defendant's insanity absolves him of criminal responsibility; and (2) diminished capacity where the mental condition is such that the defendant cannot form the culpable mental state to commit the

crime.

In this case, the psychiatric experts agreed that Clark suffered from chronic paranoid schizophrenia but their opinions were diametrically opposed with respect to the question of whether this disease or defect rendered Clark unable to appreciate the nature and quality or the wrongfulness of his acts. The 6th Circuit found that there was no miscarriage of justice in the jury's choice to credit the expert presented by the government over the one presented by the defense. Consequently, the court affirmed Clark's conviction.

The next issue presented was whether the district court erred by applying the two level enhancement for making a threat of death during the commission of the robbery under § 2B3.1(b)(2)(F). The district court found that the language "I have a gun, do what I say, nobody will get hurt" was a threat that a reasonable person would consider putting one in danger of death.

The 6th Circuit ruled that under the version of § 2B3.1(b)(2)(F) that was applicable to Clark's case, the death threat need not be "express" for this enhancement to apply. Instead, the threat can be implicit. A clear implication of Clark's message was that the teller's failure to cooperate would result in him being shot and this would instill in a reasonable person a fear of death. As a result, the court found that the district court did not err in its application of this enhancement.

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